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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1895

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC, ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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v.

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC, ET AL.,[1]
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Dow Chemical Company petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit in this case.

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[1] The National Labor Relations Board was a party in the proceedings before the Court of Appeals and is, therefore, a respondent with respect to this petition, pursuant to Supreme Court Rule 21(4), although its interests are not adverse to Dow's.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A., *infra*, pp. 1a-34a) is reported at 530 F.2d 266; its order denying rehearing (App. B, *infra*, p. 35a) has not yet been reported. The decision and order of the National Labor Relations Board (App. D, *infra*, pp. 39a-79a) are reported at 212 NLRB No. 50.

JURISDICTION

The judgment of the court of appeals (App. C, *infra*, p. 37a) was entered on February 11, 1976. Rehearing was denied on April 2, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in concluding, contrary to the NLRB, that the National Labor Relations Act requires an employer confronted with a lengthy, violent strike in breach of a no-strike agreement to attempt to compel the striking union, through court action or otherwise, to accept a resolution of the underlying dispute through grievance and arbitration procedures which the union itself has abandoned, before the employer may resort to other traditional Board- and court-approved remedies for the breach-of-contract strike, even though an injunction to halt the strike pending such resolution may be unavailable to the employer.

STATUTE INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519,

29 U.S.C. 151, *et seq.*), are set forth in Appendix E (pp. 80a-85a, *infra*).

STATEMENT OF THE CASE

A. The Facts

The events herein transpired in 1971 at The Dow Chemical Company's plastics manufacturing plant at Allyn's Point, in the town of Ledyard, Connecticut. (A. 212-213, 404-405).[2] Prior to May of that year, 16 of the 19 employees in the plant's latex department had been assigned to a "7 and 2" shift schedule —seven days on the job and two days off, with rotating shift assignments; three others worked a "5 and 2" schedule—that is, a regular five-day week. (A. 29, 232-233, 405). In mid-May the Company decided for economic reasons[3] to put all the latex department employees on a 5 and 2 schedule. (A. 224-225, 228, 405). The Company believed it had the right under its collective bargaining agreement with the Union representing the Allyn's Point plant employees[4] to make this schedule change unilater-

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[2] "A." references are to the record by the page numbers of the Appendix filed by the Union in the proceeding before the court of appeals.

[3] The Administrative Law Judge found there was no reason to doubt the decision "was premised on valid economic and business considerations." (*Infra*, p. 51a, n. 2). This conclusion has not been challenged.

[4] The hourly-rated employees at the plant were covered by a labor agreement between Dow and International Union of District 50, United Mine Workers of America, Local 13744, effective by its terms from February 23, 1970, to February 26, 1973. By the time of the events herein, the Union had

ally.[5] Company officials did, however, meet to discuss the intended change at length with Union spokesmen and entertained a grievance on the subject. (A. 41-43, 84-89, 318-324, 406-407). In fact, the Company postponed the effective date of the schedule change for a week to allow for further discussions of the matter with Union officials. (A. 89, 370, 407).

On June 7, 1971, the day the schedule change was to go into effect, the Union abandoned its attempts to resolve the dispute through the grievance procedure and struck the plant. (A. 408, 415-417). Prior to that date, the parties had processed the matter through four steps of the five-step grievance procedure provided for in their collective bargaining agreement. (A. 406-407, 416). The Union had not completed the fifth step of the procedure, nor had it

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become International Union of District 50, Allied and Technical Workers, Local 13744. It later merged into the United Steelworkers of America. (A. 8-9, 266-267, 368, 404).

[5] The Company based this belief on the language of the contract, the parties' past practice, and the history of the 1970 negotiations. Specifically, the Management Rights clause of the agreement gave the Company the sole right to determine "schedules of production" (A. 282), and a new article added in 1970 expressly set forth the 5 and 2 schedule as one that was available to the Company to use. (A. 284). Similar schedule changes from "7 and 2" to "5 and 2" had been made in the styrofoam department on many occasions under the same contract authority without any objection from the Union. (A. 68-69). During the parties' 1970 contract negotiations, Company representatives specifically pointed out that they had made such schedule changes unilaterally in the past and intended to do so in the future, and that the Union could not "argue that we don't have the right to schedule people." The Union negotiators' only response was, "We are not arguing that." (A. 327-331).

made a written request for arbitration,[6] although both of these steps were required under the agreement to be completed before the Union was free to strike.[7]

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[6] During the grievance meetings, a Union agent had orally requested arbitration, but only on an *immediate* basis, without completion of the remaining, prerequisite grievance procedures provided under the labor agreement. The Company's representative's response was to urge that the parties should "stick to the grievance procedure." He specifically pointed out in this context that "the grievance procedure included arbitration." (A. 199-20, 416, n. 16).

[7] Article 7.7 of the labor agreement (A. 298) provided:

> 7.7 Strikes and Lock-Outs.
>
> The *Union will not cause or engage in* or authorize its members to engage in *any strike* against the Company, nor will any members of the Union take part in any other strike or stoppage or curtailment of work or restriction of production or interference with production of the Company, *unless and until all of the Bargaining and Grievance Procedures outlined in this agreement have been exhausted.* The Company will not cause or sanction any lockouts unless and until all of the Bargaining and Grievance Procedures as outlined in this agreement have been exhausted.
>
> The Bargaining and Grievance Procedure in this Article has not been exhausted until all items, a, b, and c, have been carried out as set forth below:
>
> (a) The Grievance Procedure has been used and completed as set forth in Section 7.1.
>
> (b) The Grievance Procedure has been processed through the last Step in Section 7.1 and the Union or the Company has requested *in writing,* within 30 days, to proceed to arbitration as per Section 7.2.
>
> (c) *The Arbitration Procedure* in Section 7.2 *has been completed* or the Union has been denied the right to use of arbitration. (Emphasis added).

The Company continued to operate the plant during the strike, and the Union reacted with extensive violence. The Union's local president and an international representative were regularly present on the picket line, and both were adjudged in contempt of a state court injunction because of their participation in acts of picket line misconduct, as were numerous other employees. (A. 373-374). Efforts by the Company to restore peace through appeals to the strikers [8] and recourse to state mediation services [9]

[8] The Company's plant manager sent the employees a series of letters in June and July 1971 urging them to discontinue the "unlawful strike" and to encourage their Union leaders to resolve the dispute through the contract grievance and arbitration procedures. For example, in a June 11, 1971, letter to the employees, he stated (A. 341-342):

> Disputes between the Company and Union have arisen before and *we were able to resolve them in a fair manner through the grievance and arbitration clauses of the contract.* In fact, the very dispute that the strike is over is part way through the grievance procedure. I think from an employee point of view that *the grievance procedure and arbitration clause that we have at Allyn's Point is a good one. It allows the use of arbitration and determination as to which of the parties is right by an arbitrator with no affiliation with the Company or Union.*
>
> *I sincerely feel that the resolution to the problem lies in the grievance and arbitration procedure* and ask you to encourage your Union leadership to return to the legal and in my opinion morally right means of solving this problem. (Emphasis added)

Copies of this letter were sent to all employees in the bargaining unit, including the officers of the Local and members of its bargaining committee.

[9] The Company wrote the State Labor Commissioner on July 26, 1971, officially expressing its "willingness to submit

were unsuccessful. At the same time, the Company's effort to recruit replacements for the strikers was being hampered by fears of physical reprisal against workers who crossed the picket line, coupled with concern that those who did cross the line would be subjected to Union fines. (A. 166-167, 170-171, 418).[10]

The cumulative effect of these events was to make it difficult or impossible for the Company to restore the plant to normal operations during the strike. At the same time, the chance of an amicable settlement of the dispute appeared to be steadily diminishing.[11] In these circumstances, the Company concluded that

the labor dispute resulting in said strike to arbitration or mediation." (*Infra*, p. 26a). The Union was notified of the exact substance of this communication through a sworn pleading filed in a state court on August 2, 1971, and served on the Union, through its attorneys, on that day. (A. 210). The parties did thereafter attend several meetings with the mediator, but no resolution of the dispute resulted.

[10] Several employees who returned to work during the strike were, in fact, subjected to intra-union charges and fines or threats of fines. In addition, a number of job applicants reported that they had been told by Union pickets upon entering the plant grounds, that if they took jobs they would have to join the Union because of the union security clause in the labor agreement, and that they would then be subject to fines for working during a strike. (A. 174, 238-239).

[11] In addition to the failure of mediation to produce an accord (*supra*, n. 9), the prospect of a settlement was further dimmed in the Company's eyes when the Union persisted in taking a "belligerant attitude" after notification of an initial determination by the NLRB Regional Director that the Company had acted lawfully in announcing the shift schedule change. (A. 172, 418-419).

its only realistic alternative [12] was to exercise its right under then-settled NLRB and court precedents [13] to cancel the collective bargaining agreement as a remedy for the Union's material breach of the no-strike and grievance and arbitration provisions of that agreement. (A. 166-176, 184-185, 418-419, n. 21).

Accordingly, on August 9, 1971, the Company sent a letter to the Union's local and international presidents stating, "This is to notify you that because of the breach of the Collective Bargaining Agreement . . . we hereby cancel the Agreement." (A. 349). On August 18, 1971, the Company notified the striking employees that their employment had been terminated because of their "involvement in the illegal and unprotected strike." (A. 351). Thereafter, a majority of the hourly workers then employed at the plant petitioned the Company stating that they no longer wished to be represented by the Union. (A. 391-392). Consequently, on August 28, 1971, the Company wrote the Union officers withdrawing recognition of the Union as bargaining representative of the Allyn's Point plant employees. (A. 367).

Unfair labor practice charges were filed alleging that the Company's announcement of the change in the latex department shift schedule was unauthor-

[12] In evaluating what action to take, Company spokesmen considered whether an injunction would be available to halt the strike and compel arbitration, but they concluded that it would not, since the arbitration provisions of the collective bargaining agreement were not mandatory, but required mutual consent. (A. 174, 349).

[13] See authorities discussed at pp. 14-17, *infra*.

ized by the collective bargaining agreement and therefore constituted a unilateral change of employment terms in violation of Sections 8(a)(5) and (1) and 8(d) of the Act; that the cancellation of the contract and withdrawal of recognition from the Union also violated Section 8(a)(5) and (1); and that the discharge of the strikers violated Section 8(a)(3) and (1).

B. The Decisions Below

1. *The Board's Findings and Conclusions.*

The Board, adopting the decision of its Administrative Law Judge, held that the Company violated Section 8(a)(5) and (1) of the Act by its announcement of the change in the latex department employees' work schedule. It found, however, that this "unilateral action . . . was not of such scope as to constitute a 'modification' of the contract within the meaning of Section 8(d)" of the Act and that the "contract grievance procedure was available for the peaceful resolution of the dispute," but that the Union "failed to submit the dispute in accordance with" the grievance and arbitration provisions of the agreement. (*Infra*, pp. 40a, 67a, 71a).

In these circumstances, the Board concluded, under the rationale of its decision in *Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802 (1961), that the Company's unilateral conduct was not a sufficiently serious unfair labor practice to immunize the Union's subsequent strike from the effect of the parties' no-strike agreement under the rule of *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270 (1956).[14]

[14] As discussed more fully *infra*, pp. 15-16, *Mastro Plastics, supra*, holds that, absent explicit language to the con-

In the Board's view, the Company's conduct here "was not of such serious nature as to be 'destructive of the foundation on which collective bargaining must rest.'" (*Mastro Plastics*, *supra* at 281). Therefore, the Board held, the Union's strike constituted an unexcused, material breach of the no-strike clause which warranted the Company, under the rule of *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953), enf'd, 223 F.2d 338 (D.C. Cir. 1955), cert. denied, 350 U.S. 981, in exercising the traditional breach-of-contract remedy of cancellation. And since the strike was "unprotected from its inception," the Board further concluded that the participants therein "forfeited any rights they may have had to reinstatement," and that the Company acted within its rights in discharging them. (*Infra*, pp. 70a-71a, 72a-74a, 76a). Finally, having found that the strikers were validly terminated, the Board concluded that the Company was entitled to withdraw recognition from the Union based upon the petition signed by a majority of the employees then employed stating that they no longer wished to be represented by the Union. (*Infra*, pp. 76a-77a).

Based on these conclusions, the Board determined that no remedial order was warranted or necessary

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trary, a general no-strike clause does not waive the employees' right to strike against flagrant unfair labor practices committed by the employer. In *Arlan's Department Store, supra,* the Board, interpreting *Mastro,* held that strikes in breach of a no-strike clause would be permitted only to protest *serious* unfair labor practices—that is, those "destructive of the foundation on which bargaining must rest."

and that the complaint should be dismissed in its entirety.[15]

2. *The Court of Appeals' Decision*

On review, the Court of Appeals agreed with the Board's finding "that the union failed to exhaust the grievance procedures and that it did not file a written request for arbitration" as required under the labor agreement before the Union could strike. Accordingly, the court concluded that "the strike was not one authorized by the contract's limited reservation of a right to strike." (*Infra*, p. 12a). Nevertheless, the court held that the Board erred in determining that the Company's responses to the strike were not unfair labor practices, since, in the court's view, the Board should have considered the Company's failure to pursue a possible resolution of the underlying dispute through either a court suit to compel completion of the grievance procedure or some direct action to channel the dispute into arbitration. (*Infra*, pp. 27a-28a).

In the court's opinion, the Board could not properly decide the case "by simply pigeon-holing it as within the rule of *Mastro Plastics* or that of *Arlan's*." (*Infra*, p. 13a). Instead, the court reasoned, this Court's decision in *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970), and other recent court decisions expanding the federal policy favoring arbitration "have depleted the force of the *Mastro Plastics/Arlan's* formulation" and of the doctrine of material breach set forth in *Marathon Electric*,

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[15] Member Fanning agreed with the finding of a Section 8(a)(5) and (1) violation, but dissented from the remainder of the Board's decision.

supra, upon which the Board had rested its holding in this case.

The Court of Appeals acknowledged that *Boys Markets, supra*, was not directly applicable, since the arbitration clause in this case was elective rather than mandatory, and that a *Boys Markets* injunction to compel arbitration was therefore unavailable to the Company in the circumstances presented here. But the court concluded that the policy expressed in *Boys Markets* and other recent cases required that the Company take other affirmative steps to force the Union to accept a peaceful settlement of the dispute through the grievance and arbitration procedure before it was entitled to resort to the traditional breach-of-contract remedies approved in *Arlan's* and *Marathon Electric, supra*. Ignoring the efforts which the Company did make to channel the dispute into arbitration, the court opined that if the Company had either filed suit under Section 301 of the Act to compel the union to complete the grievance procedure or more clearly expressed its own willingness to arbitrate the dispute, "it is highly probable that the union would at least have suspended the strike." (*Infra*, p. 27a).[16]

Analyzing the impact of its decision, the Court of Appeals predicted that the imposition of these prerequisites to the exercise of the more traditional breach-of-contract remedies approved in *Arlan's* and

[16] The Court of Appeals found it unnecessary to "reach the question whether the Company could have obtained a *Boys Markets*-type injunction [to halt the strike] pending compliance of [sic] the compulsory grievance procedure." (*Infra*, p. 25a, n. 17).

Marathon Electric will "further the interests of stability, predictability and reckonability in the area of labor law," yet will not "detract from the important role of the Board in formulating and administering national labor policy." Explaining, the court declared that under its decision, the Board "may play a key role in future disputes such as that at bar" by submitting *amicus* briefs to the federal courts in *Boys Markets* cases in which the courts "solicit the expertise of the Board" in that form. (*Infra*, pp. 29a-30a).

Based on the foregoing reasoning, the Court of Appeals concluded that the case should be remanded to the Board for reconsideration. Accordingly, it granted the Union's petition for review and vacated the Board's order dismissing the complaint against the Company.

Dow filed a petition for rehearing and suggestion for rehearing in banc, which was denied on April 2, 1976. The order of the full court disclosed that Judge Rosenn would have granted rehearing. (*Infra*, p. 36a).

REASONS FOR GRANTING THE WRIT

A. Review Should Be Granted to Resolve the Conflicts Created By the Court of Appeals' Decision.

The Court of Appeals' decision in this case, by interpreting the federal policy favoring arbitration of labor disputes to impose a bar to traditionally-approved employer responses to a union's breach-of-contract strike, creates conflict with a long-established body of NLRB and court precedents. Until the Court of Appeals ruled to the contrary herein the Board and the courts had consistently held the

contract doctrine of material breach applicable to labor agreements. Thus, the settled rule was that if a union strikes in breach of a no-strike provision, the employer is entitled to exercise the traditional contract remedy of cancellation of the agreement. As the District of Columbia Circuit stated in *United Electrical Workers* v. *N.L.R.B.*, 223 F.2d 338, 341 (D.C. Cir. 1955), cert. denied, 350 U.S. 981, enforcing the Board's decision in *Marathon Electric*, *supra*:

> It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts. Moreover, in cases where the breach is a strike in violation of a collective bargaining agreement, as in the instant case, application of the rule is supported by the rationale underlying such agreements. The prevention of strikes is one of the principal purposes of labor contracts and of the Act. A no-strike provision is 'the chief advantage which an employer can reasonably expect from a collective labor agreement.' The walkout was a material breach which justified the subsequent rescission of the contract by the company.

Accord: *Boeing Airplane Co.* v. *Aeronautical Industries Lodge No. 751, Int'l Ass'n of Machinists*, 188 F.2d 356 (9th Cir. 1951), cert. denied, 342 U.S. 821, aff'g 91 F. Supp. 596 (W.D. Wash. 1950); *Children's Rehabilitation Center, Inc.* v. *Service Employees Int'l Union, Local 227*, 503 F.2d 1077 (3rd Cir. 1974), cert. denied, 419 U.S. 1090; *Kellstone, Inc.*, 206 NLRB 156, enf'd 493 F.2d 1352 (6th Cir. 1974).[17]

[17] *Cf. United Biscuit Co.* v. *N.L.R.B.*, 128 F.2d 771, 775 (7th Cir. 1942); *Hotel Employees* v. *Nationwide Downtowner*, 229 F. Supp. 413, 417 (W.D. Mo. 1964); *United Steelworkers* v. *Rome Plow Co.*, 321 F. Supp. 1170, 1175 (N.D. Ga. 1970), aff'd 437 F.2d 881 (5th Cir. 1970); and see *Arundel Corp.*, 210 NLRB 525 (1974).

Similarly, the principle was settled, prior to the Court of Appeals' decision in this case, that employees who participate in a strike in breach of a no-strike clause in a collective bargaining agreement thereby violate a condition of their employment and are subject to discharge. *Atkinson* v. *Sinclair Refining Co.*, 370 U.S. 238, 246 (1962), and cases there cited; *N.L.R.B.* v. *Sands Mfg. Co.*, 306 U.S. 332 (1939).

The right of an employer to exercise these traditional responses to a strike during the term of a collective bargaining agreement depended, under heretofore settled law, upon a single, basic consideration: whether the strike violated the collective bargaining agreement. In the case of strikes undertaken to protest employer unfair labor practices, that determination was governed by the language of the particular agreement and the facts of the case, considered in light of this Court's decision in *Mastro Plastics Corp.* v. *N.L.R.B.*, 350 U.S. 270 (1956), and the Labor Board's subsequent interpretation of that case in *Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802 (1961).

In *Mastro Plastics*, this Court declined to construe a general no-strike clause as a waiver of the employees' right to strike in protest over a flagrant unfair labor practice by their employer, absent explicit contract language indicating that the clause was intended to have that effect. In *Arlan's*, the Board read *Mastro Plastics* as extending only to strikes to pro-

test *serious* unfair labor practices—that is, unfair labor practices "destructive of the foundation on which collective bargaining should rest." 133 NLRB at 808.[18] It reasoned that less serious unfair labor practices can and should be resolved through the contract grievance process, rather than by strikes. Accordingly, the Board concluded that strikes over such less-serious unfair labor practices are violative of no-strike agreements, and that the participants therein are subject to discharge under the usual rules governing breach-of-contract strikes. *Id.* at 807-808.

The Board has applied its *Arlan's Department Store* rule consistently since 1961. The rule has been accepted by all the courts that have considered it except by the Third Circuit in the instant case. It was cited with approval by the district court in *Dow Chemical Co.* v. *International Union of Electrical Workers*, 82 LRRM 3181 (M.D. Fla. 1971), aff'd, 480 F.2d 433 (5th Cir. 1973), cert. denied, 415 U.S.

[18] The unfair labor practice which provoked the strike in *Mastro Plastics, supra*, was the discharge of a leading adherent of the incumbent union, occurring in the context of an intensive and deliberate campaign by the employers "to influence and even to coerce their employees" to abandon the incumbent union in favor of a rival group. (350 U.S. at 278). The unfair labor practice which the employees in *Arlan's supra*, struck to protest, although also consisting of an unlawful discharge, was found by the Board to be different in character. It grew out of a supervisor's resentment of the employee's conduct as union steward and thus involved, in large part, a personality conflict. The Board found this was "the very kind of dispute, although constituting an unfair labor practice, which the employees, rather than striking, could and should have submitted to the contract grievance procedure . . . ." 133 NLRB at 808.

932, and by the Fifth Circuit in *Pence Construction Corp.* v. *Hoisting and Portable Eng. Local 450*, 484 F.2d 398 (5th Cir. 1973), cert. denied, 414 U.S. 1144. The rationale of *Arlan's* also received favorable comment from the District of Columbia Circuit in *Local 833, United Auto Workers* v. *N.L.R.B.*, 300 F.2d 669, 704 n. 19 (D.C. Cir. 1962), cert. denied, 370 U.S. 911.

Furthermore, the limited reading of *Mastro Plastics* upon which the Board based its holding in *Arlan's* has been confirmed in decisions of this Court. Thus, in *Drake Bakeries, Inc.* v. *Bakery & Confectionery Workers*, 370 U.S. 254, 265 (1962) this Court said, in explaining *Mastro*, that it "involved a flagrant unfair labor practice by the Company threatening the very existence of the union itself" and that "the parties could not have intended to waive the employees' right to strike over a *flagrant* unfair labor practice." (Emphasis added). See also *N.L.R.B.* v. *Magnavox Co. of Tennessee*, 415 U.S. 322, 325 (1974).

The Court of Appeals' decision in this case casts aside this entire body of precedent with the observation that "recent developments in labor law have depleted the force of the *Mastro Plastics/Arlan's* formulation." (*Infra*, pp. 30a-31a). Under the Court of Appeals' holding, the *Arlan's/Mastro Plastics* determination apparently becomes irrelevant. The employer's rights are made dependent not upon whether or not the strike constitutes a breach of contract, but on another, wholly different set of considerations: whether the employer has sought an injunction against the strike under *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970); whether,

if a *Boys Markets* injunction is unavailable (as in the instant case), the employer has nevertheless instituted a federal court suit under Section 301 of the Taft-Hartley Act to compel completion of the contract grievance process; and whether the steps the employer has taken affirmatively to encourage the union to arbitrate the dispute voluntarily are, in the court's opinion,[19] sufficient. An employer's failure to satisfy these stringent prerequisites before exercising traditional contract remedies may be grounds for finding him guilty of an unfair labor practice under the Court of Appeals' decision in this case.

The decision of the Court of Appeals is thus in direct conflict with the above-cited decisions of various other circuits approving the Board's *Arlan's Department Store* and *Marathon Electric* rules. Certiorari should be granted to resolve this conflict and to clarify the question of the continuing validity of those long-established rules.

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[19] The facts of this case demonstrate the stringency of the requirement thus imposed by the court below. Thus, the Company's action, in writing to every employee, including the Union officers, during the strike reminding them of the contract grievance and arbitration procedures and asking them to urge their leaders to return the dispute to these procedures as "the legal and . . . morally right means of solving this problem" (*supra*, p. 6, n. 8) was held by the Court of Appeals to be insufficient to indicate the Company's willingness to arbitrate. (*Infra*, p. 26a). Similarly deemed insufficient was the Company's notification to the State Labor Commissioner of its willingness to submit the dispute "to arbitration or mediation" (*infra*, p. 26a), even though the parties had stipulated that the exact text of this notice was communicated to the Union, through its lawyers, in sworn court pleadings prior to the cancellation of the contract. (*Supra*, p. 6, n. 9).

B. This Court Should Act to Clarify the Impact of *Boys Markets* Upon the Rights of Employers Faced with Breach-of-Contract Strikes.

The Court of Appeals' decision demonstrates that clarification by this Court of the impact of *Boys Markets, Inc.* v. *Retail Clerks Union, supra*, and other cases involving the federal policy favoring arbitration upon the rights of employers confronted with breach-of-contract strikes is needed to resolve questions of substantial importance in the administration of the National Labor Relations Act.

Nothing in *Boys Markets* or the other recent cases cited by the Court of Appeals appears to require modification of the established principles of labor law, relied on by the Company and reaffirmed by the NLRB in this case, which define an employer's permissible responses to a breach-of-contract strike. On the contrary, this Court expressly acknowledged in its *Boys Markets* opinion that "other avenues of redress . . . [besides arbitration] *remain available to an aggrieved employer* . . ." in the event of such a strike (398 U.S. at 248 and n. 17, emphasis added). Indeed, the Court referred specifically to the right of employers to discharge participants in a breach-of-contract strike as a right which "of course . . . would remain available . . ." (*Ibid.*) *Boys Markets* indicates that it was not because this Court regarded such self-help remedies as illegal, but rather because they are often unfeasible or "inexpedient" (394 U.S. at 248, n. 17) that it concluded that injunctive relief should *also* be made available. (*Ibid.*)

The Court of Appeals' conclusion that *Boys Markets* and its progeny dictate a modification of the earlier cases establishing the rights of employers in

breach-of-contract strike situations is thus in apparent conflict with this Court's reasoning in *Boys Markets*. If the decision below is permitted to stand, it will create uncertainty about the scope and meaning of the *Boys Markets* line of cases which will cloud the rights of employers whenever such strikes occur. This petition calls upon this Court to clarify the implications of those cases and thus resolve an important and recurring question under the National Labor Relations Act.

C. This Case Presents Questions of Substantial Importance in the Implementation of Federal Labor Policy.

The Court of Appeals, by basing its decision in this case upon its own view of how the Act's policy to promote peaceful settlement of labor disputes should be implemented, rather than the contrary view underlying the Board's decision, improperly invaded the Board's province as the agency primarily responsible for determining how best to effectuate the policy expressed by Congress. We believe it was well within the Board's province to conclude that retention of the traditional remedies for breach-of-contract strikes is supportive, rather than destructive, of the federal policy favoring resolution of disputes through grievance procedures and arbitration. For in cases such as this, where no other deterrent can be relied upon, the sure knowledge that participation in a contractually prohibited strike will subject employees to lawful discharge unquestionably has a strong tendency to discourage employees from resorting to strikes when peaceful avenues are open to them. Similarly, knowledge that a union's material breach of a no-strike clause may lead to lawful cancellation

of a labor agreement, with resultant loss to the union of such contractual benefits as compulsory membership and dues checkoff, will surely cause most union leaders to explore peaceful alternatives carefully before resorting to a prohibited strike.

Federal labor policy, of course, prefers peaceful dispute-settlement methods over self-help remedies. But at the same time, the Board and the courts have recognized, until now, that the availability of self-help remedies provides the underlying impetus upon which the collective-bargaining system functions. This Court underscored this characteristic of the collective bargaining system in *N.L.R.B.* v. *Insurance Agents International Union*, 361 U.S. 477 (1960), when it observed that the "presence of economic weapons in reserve, and their actual exercise on occasion by the parties, is part and parcel of the system that the Wagner and Taft-Hartley Acts have recognized." 361 U.S. at 489. The recognition that employers must be free to resort, upon occasion, to direct measures in response to unions' contract breaches, in order to "channelize" the collective bargaining relationship within a peaceful framework, is reflected in the long-established rule of labor law that an employer is not obligated to bargain collectively *or even to process grievances* during the pendency of a strike in breach of a no-strike agreement. *United Elastic Corp.*, 84 NLRB 768 (1949). Accord, *Arundel Corp.*, 210 NLRB 525, 527 (1974); *International Shoe Corp.* 152 NLRB 699 (1965); *Timken Roller Bearing Co.* v. *N.L.R.B.*, 161 F.2d 949 (6th Cir. 1947).

The decision of the court below in the present case, by casting out these settled principles and foreclos-

ing resort to direct remedies even in the extreme circumstances confronting the Company here, would alter the basic scheme of the Act. It would place the ultimate burden for enforcing adherence to mutually agreed-upon procedures for solving labor-management disputes, not upon the parties themselves, as the Act contemplates, but entirely upon the courts. *Boys Markets* and the other cases cited by the court below neither require nor support such a result.

The Court of Appeals criticizes the Board's conditioning a union's right to strike in protest of an unfair labor practice upon "the *Mastro Plastics/ Arlan's* formula, "reasoning that it precludes the drawing of precise lines and thus places unions "on the horns of a dilemma." (*Infra*, pp. 28a-29a).[20] On the other hand, the court readily endorses Professor Cox's view that an employer's right to resort to the remedy of contract cancellation should be conditioned upon an analysis of such factors as "the length of the strike, injury to the employer, the number of employees affected, the degree of fault upon the part of the union . . ." and others (*Infra*, pp. 31a-32a).[21]

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[20] The "dilemma" posed by the Court of Appeals, of course, arises only if the union insists on *striking* to protest what it perceives as an unfair labor practice. The union can always avoid the dilemma by pursuing a remedy through contractual procedures or the Board's processes.

[21] The article by Prof. Cox, cited by the Court of Appeals for other purposes (*infra*, p. 32a), supports the Board's position in *Arlan's*. See Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 Mich. L. Rev. 1, 14-19 (1958), cited with approval in *Arlan's Department Store, supra*, 133 NLRB at 806-807. In his view, "[a] single discriminatory discharge or bit or unilateral action would not be a material breach [of the collective bargaining agreement] and would not excuse counter-performance" by the union in abiding by its no-strike agreement. See 57 Mich. L. Rev. at 18.

In both respects, the court's reasoning would undermine, rather than support, the "paramount interests in labor peace" upon which the court relies. Modification of the *Arlan's* formula would weaken a legal impediment to strikes over issues which can be resolved and remedied through NLRB or arbitration processes.[22] Adoption of the Cox formula would remove a practical deterrent to such strikes by severly limiting the employer's ability to respond effectively. In both ways, the view espoused by the Court of Appeals would facilitate strikes in derrogation of peaceful alternatives.

Furthermore, the court below has gone beyond even Professor Cox's theory in restricting the circumstances in which the employer can resort to traditional remedies. Indeed, the very factors Cox says should be considered point to a result contrary to that reached by the court in this case. The "length of the strike," for example, was six days in the *Marathon Electric* case which Professor Cox criticized.[23]

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[22] Under the decision below, whether a union's strike in breach of a no-strike clause is protected or unprotected activity appears to depend largely on the nature of the employer's conduct *after the inception of the strike*. This is a substantial modification of the *Arlan's* rule, which looks to the seriousness of the employer's *prestrike conduct* to make this determination. Under the Court of Appeals' formula, even strikes over trivial or unintended technical violations would become protected if the employer failed to take all appropriate "precautions" (*infra*, p. 29a) in responding.

[23] *Marathon Electric Mfg. Co., supra*. The strike in *Marathon Electric* began at 2:00 p.m. on February 28, 1952. The employer locked the employees out at approximately 2:40 p.m.

Here, on the other hand, the Company endured the strike for over two months before resorting to self-help remedies. In *Marathon* the "injury to the employer" was minimal; here, it was extreme.[24] The "degree of fault upon the part of the union" is, of course, a more subjective consideration. The Administrative Law Judge and the Board obviously perceived this as a case in which the burden of fault for the breakdown of peaceful labor relations rested with the Union. The court, substituting its judgment for that of the Board, took a contrary view on the ground that the Company had alternative "legal and contractual remedies available to it." (*Infra*, p. 32a). But even if such alternative remedies did exist,[25]

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that day, discharged the strikers on February 29, began advertising for replacements on March 3, and cancelled the labor agreement on March 5, 1952. (106 NLRB at 1172-1173).

[24] Although the record does not permit a finding as to the full extent of the Company's damages, it is sufficient to eliminate any doubt that they were substantial. Moreover, in addition to monetary and business losses, the Company and its non-striking employees suffered extensively from the rampant acts of violence for which the Union and its local and international representatives were held to be responsible. See also A. 418-419 n. 21, where the Administrative Law Judge summarized the "matters which [Plant Manager] Bartolomeo in fact did take into consideration in finally reaching a decision to cancel the contract."

[25] The cases cited by the court include no direct precedent upholding the right of an employer to compel completion of a grievance procedure under Section 301 in circumstances comparable to those presented here. *Jones & Laughlin Steel Corp.* v. *UMW*, 519 F.2d 1155 (3rd Cir. 1975), the only case cited by the court in which completion of a grievance procedure was ordered in the absence of injunctive relief against an on-going work-stoppage, involved a unique, limited type of

their availability to the Company at the time of these events was certainly far from evident, and their use would clearly have entailed a substantial risk of further losses before a final resolution of the dispute could have been obtained. The Union, on the other hand, had available from the outset clear, well-defined and readily accessible avenues of redress. Indeed, it had a choice of proceeding through NLRB processes or contract grievance procedure, either of which would have provided it with a complete remedy if its position had been sustained, without any attendant risks.[26] If, in fact, the policy of the Act compels a balancing of "degree[s] of fault" in cases such as this, then we respectfully submit that the foregoing circumstances justified the Company's resort to traditional contract remedies.[27]

As this Court has recognized, employers enter into arbitration clauses because they receive in return a

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work-stoppage which was specifically authorized by the parties' contract. There was no comparable authorization in the agreement involved in this case.

[26] If the change had been permitted to go into effect and the Union's position had subsequently been sustained by the NLRB or an arbitrator, the affected employees could have fully recovered any interim losses sustained by them as a result of the alteration of their shift schedules. The Company, on the other hand, could never have recovered the additional costs it would have incurred if it had postponed the change until after arbitration or court proceedings were completed.

[27] Prof. Cox suggested that, in applying his test, the courts might ultimately draw a line "between a more or less spontaneous uprising and a planned resort to economic pressure sanctioned by union offiicals in deliberate disregard of their written obligation." See Cox, *supra*, 57 Mich L. Rev. at 19. The strike in the present case would clearly fall within the latter category. (See A. 408, and n. 7).

quid pro quo through the union's no-strike pledge. The incentive for an employer to enter into such an agreement is seriously diminished if the assurance of uninterrupted operation during the term of the agreement is missing. *Textile Workers* v. *Lincoln Mills*, 353 U.S. 448, 459 (1957). The Court of Appeals decision in the instant case removes any such assurance, and ignores its own conclusions that the Union's actions dissipated the mutual covenants contained in the contract's no-strike/arbitration procedure. The Court of Appeals formula thus destroys the mutuality of obligations contained in the collective bargaining agreement, and requires the Company to undertake additional obligations in the face of the Union's contract breach. If allowed to stand, this decision will not lessen industrial strife, but will encourage unions to breach no-strike clauses and discourage employers from entering into the type of arbitration clause found in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2163

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

THE DOW CHEMICAL COMPANY,
Intervenor.

ON PETITION FOR REVIEW AND CROSS APPLICATION
FOR ENFORCEMENT OF AN ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

Argued September 11, 1975
Before: ALDISERT, GIBBONS and WEIS, *Circuit Judges.*

OPINION OF THE COURT

(Filed January 8, 1976)

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ALDISERT, *Circuit Judge.*

The major question in this petition for review and cross-application for enforcement of a National Labor Relations Board order is whether the Board should have considered the effect of *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970). The Board found that the company had committed an unfair labor practice, and that the union struck in protest, but that the strike breached a no-strike clause in a labor contract providing for grievance and arbitration procedures. Although we will not disturb the Board's conclusion that the company committed an initial unfair labor practice, we will grant the petition for review of other portions of the Board's order and remand the proceedings to the Board for reconsideration.

I.

The case derives from a dispute between the Dow Chemical Company and a local of the Allied and Techanical Workers Union [1] representing latex department employees at the Dow Chemical plant in Allyn's Point, Connecticut. Prior to May of 1971, 16 of the 19 latex department employees worked on a "7 to 2" shift—seven days on the job, then two days off; three others worked a regular five-day week. After the company lost a large customer, with a resulting sales drop, it decided to institute a five-day work week for all latex department employees.

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[1] The International Union of District 50, Allied and Technical Workers, Local 13744 filed the original complaint with the General Counsel to the NLRB. That local has since become a part of the United Steelworkers of America.

The company estimated that, as a consequence of the change, the 16 affected employees would earn approximately $570 less annually[2] due to the reduction in hours worked, the elimination of overtime, and the loss of weekend and holiday premiums. The union protested the company's proposed action, contending that the company could not implement the change without first bargaining. The company answered that, under the labor contract's management-rights clause, it could make the change without bargaining.[3]

The collective bargaining agreement in effect at the time contained a no-strike, no-lockout provision which preserved to the union a limited right to strike. The union could not strike, however, unless and until three pre-conditions had been satisfied: first, a five-step grievance procedure had to be exhausted; second, a written request to proceed to arbitration had to be filed within 30 days of the completion of the five steps; third, the arbitration process had to be completed or refused by the company.[4] Step 5 of the grievance procedure provided:

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[2] The union estimated each affected employee would lose about $1,500-$2,000 annually.

[3] Company Personnel Manager James Johnson stated that the company "would be willing to discuss it, but as far as negotiating, no."

[4] *7.7 Strikes and Lock-Outs.*

The Union will not cause or engage in or authorize its members to engage in any strike against the Company, nor will any members of the Union take part in any other strike or stoppage or curtailment of work or restriction of production or interference with production of the Company, unless and until all of the Bargaining and Grievance Procedures outlined in this agreement have been exhausted. The Company will not cause or sanction any lock-outs unless and until all of the Bargaining and Grievance Procedures as outlined in this Agreement have been exhausted.

The Bargaining and Grievance Procedure in this Article has not been exhausted until all items, a, b, c, have been carried out as set forth below:

(a) The Grievance Procedure has been used and completed as set forth in Section 7-1.

(b) The Grievance Procedure has been processed through the last Step in Section 7.1 and the Union or the Company has requested in writing, within 30 days, to proceed to arbitration as per Section 7.2.

(c) The Arbitration Procedure in Section 7.2 has been completed or the Union has been denied the right to the use of arbitration.

App. at 298a. The arbitration provision was broad in scope, and an arbitrator's decision was final and binding. However, submission to arbitration was predicated upon consent. The contract provided:

7.2 Arbitration.

Should the Grievance Procedure outlined in 7.1 of this article fail to resolve a problem involving a layoff, a discharge, or the interpretation of any provision of this agreement, such problem may be submitted to any arbitrator or a board of arbitration provided the bargaining committees representing the Union and the Company each furnish written consent to utilize arbitration.

The agreement to arbitrate shall contain a statement of the issue or issues to be submitted to arbitration. This statement of issue or issues shall be arrived at by joint action of the Union and Company representatives. The agreement to arbitrate shall also provide that the arbitration decision will be final and binding on both par-

Step 5. Should a satisfactory solution not be arrived at in Step 4, the Union chairman of the

> grievance committee shall so notify the Plant Manager, or appointee, in writing and within ten days the Company shall arrange for the unresolved case to be reviewed by the Midland Division Manager in charge of the Allyn's Point Plant or his appointees.

App. at 296a-97a.

The parties agree that they completed the first four steps of the grievance procedure, with the Step 4 meeting taking place on June 3, 1971. On June 4,

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> ties. The arbitrator, or the method of selecting an arbitrator or a board of arbitration will be agreed upon by the two bargaining committees. (All expenses incident to the service of the arbitrator shall be paid jointly by the Union and the Company.) (The Company shall not be obligated to pay for time lost in carrying out arbitration.)
>
> Separate grievances may not be joined in one arbitration proceeding except by mutual agreement of the parties.
>
> The parties hereto may appoint an impartial arbitrator by mutual agreement; failing to agree on such appointment, an arbitrator shall be chosen from a list of seven names submitted by the Federal Mediation and Conciliation Service.
>
> The arbitrator will be selected from this list by means of the strike-off method, with the Union having the privilege of striking off the first name. The last name remaining will constitute the agreed-upon arbitrator.
>
> The arbitrator shall make no award affecting a change, modification, subtraction, or addition to this Agreement, and shall confine himself strictly to the facts submitted in the hearing, or post hearing briefs, the evidence before him and the terms of the Agreement.

Ibid. at 297a.

the Friday before the schedule change was to be implemented, a union representative, the company's industrial relations manager for the plant, and the company's industrial relations manager for the division encompassing the plant conducted a three-way telephone conversation. Nothing was said about a Step 5 meeting. The following Monday, June 7, a company representative and a union representative addressed about 100 production employees in the plant parking lot. After the meeting, the union representative testified, "the whole thing erupted", with the employees shouting that they were not going to work.[5] Picketing began the next day. Subsequent meetings with state mediation officials failed. During the summer, the company wrote three letters beseeching the employees to discontinue the "unlawful strike". On July 23, the company wrote telling the employees that it would begin hiring replacements July 29. By letter of August 9, the company rescinded the collective bargaining agreement. Eight days later, the company terminated the striking employees. Shortly thereafter, a majority of the then-employees petitioned the company stating that they no longer wished to be represented by Local 13744. Consequently, by letter dated August 28, the company informed the union that it would no longer recognize the union as bargaining agent for the hourly rated employees at the plant.

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[5] Because of the strike, the schedule change was not implemented.

II.

When the dispute reached the National Labor Relations Board, the company argued alternatively (1) that it had the right to implement the schedule change under the management-rights clause, and (2) that, if it did not, the union's strike was unprotected activity in derogation of the collective bargaining agreement. Accordingly, the company contended it had the right to rescind the collective bargaining agreement, terminate the employees and refuse to recognize the union as the bargaining agent.

The union, on the other hand, argued that it had complied sufficiently with the grievance procedure so that the strike was not violative of the no-strike clause. Even if the strike did violate the contract, however, the union argued that the strike was in protest of an unfair labor practice and therefore protected activity. Accordingly, none of the company's subsequent actions was permissible.

The administrative law judge's conclusions may be summarized as follows:

(1) The company violated Sections 8(a)(5) and 8(a)(1) by unilaterally announcing and scheduling the shift changes for the latex department.[6]

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[6] Section 8(a)(5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees" concerning wages, hours, and other terms and conditions of employment. 29 U.S.C. § 158(a)(5).

Section 8(a)(1) of the Act declares it to be an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the right to self-organization, to form, join or assist labor organizations, to bargain collectively and to

(2) The union did not complete Step 5 of the grievance procedure, nor did it make a written request for arbitration.

(3) *Mastro Plastics Corp.* v. *NLRB*, 350 U.S. 270 (1956), held that a strike designed, not to modify or terminate a collective bargaining agreement, but "to protest the unfair labor practices of petitioners," *ibid.* at 286, was protected activity.

The Court underscored two complementary, congressionally-endorsed policies of labor law: one seeking to preserve a competitive business economy, the other seeking to preserve the rights of labor to organize and bargain collectively for better conditions. *Ibid.* at 279-80. The Court recognized that, assuming fair representation, a collective bargaining agreement could waive a union's right to strike during the term of the contract. However, it was found that, viewed as a whole, the contract in *Mastro Plastics* dealt "solely with the economic relationship between the employers and their employees." *Ibid.* at 281. Accordingly, there was an insufficient basis for implying that the union had contracted not to strike at all, even against an unfair labor practice.

In *Mastro Plastics* the company's initial unfair labor practice was termed "a flagrant example of interference by the employers with the expressly protected right of their employees to select their own

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engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection. 29 U.S.C. § 158(a)(1). "Accordingly, it has been held that violations of subsections (2), (3), (4) and (5) are also violations of Section 8(a)(1)." A. Cox & D. Bok, Cases and Materials on Labor Law 143-44 (7th ed. 1969).

bargaining representative." *Ibid.* at 278. Relying upon this finding the NLRB has adopted the rule that "only strikes in protest against *serious* unfair labor practices should be held immune from general no-strike clauses." *Arlan's Department Store of Michigan, Inc.*, 133 N.L.R.B. 802, 807 (1961) (emphasis added). On the facts of this case, the company's "unilateral conduct, although found to be an unfair labor practice, was not of such serious nature as to be 'destructive of the foundation on which collective bargaining must rest.'" App. at 416a (opinion of administrative law judge, quoting *Mastro Plastics, supra*, 350 U.S. at 281). Therefore, the strike that began on June 7 "was unprotected from its inception." *Ibid.* at 417a.[7]

(4) The company did not violate Sections 8(a)(5) and 8(a)(1) when it rescinded the collective bargaining agreement, because the union previously had breached the contract's no-strike clause.

(5) The striking employees forfeited whatever rights they had had to reinstatement by participating in the unprotected strike. Accordingly, the company did not violate Sections 8(a)(3)[8] and 8(a)(1) by terminating the striking employees.

[7] The General Counsel and the charging party approached this issue differently before the administrative law judge. The union argued that the strike was in protest of a serious unfair labor practice from its inception. The General Counsel, on the other hand, contended that the strike that began on June 7 as an unprotected activity was converted into an unfair labor practice strike, particularly by the company's cancellation of the contract. The administrative law judge rejected the General Counsel's argument, because he found the rescission of the contract was permissible. App. at 419a. Because of the view we take, the distinction between the arguments advanced need not detain us.

(6) Because the terminations were lawful, the company did not violate Section 8(a)(5) by withdrawing recognition of the union.

On these conclusions, the administrative law judge found that no remedial action was appropriate and recommended that the complaint be dismissed in its entirety.

By a vote of two-to-one, a three-member panel of the Board affirmed the administrative law judge's rulings, findings and conclusions, and adopted his recommended order. The majority did not issue an opinion. Member Fanning dissented in part and filed an opinion. He agreed that the company's initial action violated Section 8(a)(5). He stated, however, that he interpreted *Mastro Plastics* to permit strikes in protest of any unfair labor practices, not just serious ones; moreover, assuming *Arlan's Department Store* to be the rule, the company's violation of the Act was a serious unfair labor practice. Thus, the company was not justified in cancelling the contract, terminating the employees, or withdrawing recognition.

III.

As the case comes to us, the first two conclusions of the administrative law judge do not present difficult issues.

[8] Section 8(a)(3) of the National Labor Relations Act makes it an unfair labor practice to discriminate in regard "to hire or tenure of employment or any term or condition of employment" on the basis of membership in a labor organization. 29 U.S.C. § 158(a)(3).

First, we find substantial evidence in the record viewed as a whole to support the Board's conclusion that the management-rights clause did not justify the unilateral implementation of the shift changes. Accordingly, we agree with the Board that the company violated Sections 8(a)(5) and 8(a)(1).

Second, in its petition for review, the union does not press the contention that it had complied sufficiently with the grievance procedure so that the strike was one authorized by the collective bargaining agreement. In any event, we would agree with the majority of the Board that the union failed to exhaust the grievance procedures and that it did not file a written request for arbitration. Accordingly, the strike was not one authorized by the contract's limited reservation of a right to strike.

The remaining issues are infinitely more complex. We proceed, then, to the questions of whether the union's strike was otherwise protected and, if not, what consequences are appropriate.

IV.

Petitioner argues that *Mastro Plastics*, *supra*, stands for the proposition that strikes in protest of unfair labor practices are protected activity, irrespective of the nature of the initial unfair labor practice. Alternatively, petitioner contends that, under the Board's *Arlan's Department Stores* decision, *supra*, the company's unfair labor practice was "serious" and, therefore, the strike was protected activity. The Board takes the position that *Arlan's* controls, and that the Board did not abuse its discretion in finding the company's unfair labor practice "nonserious". The intervenor-company argues alternatively (a) that it did not commit an unfair labor practice and (b) that, if it did, it was not a serious one.

We decline the invitation to resolve this case by simply pigeon-holding it as within the rule of *Mastro Plastics* or that of *Arlan's*. In *Arlan's*, the Board observed that *Mastro Plastics* "must be understood in its setting". 133 N.L.R.B. at 804. The Board was speaking of the *factual* setting. We agree. However, both *Mastro Plastics* and *Arlan's* also must be understood in terms of their *legal* settings. We perceive fundamental developments in national labor policy since *Mastro* (in 1956) and *Arlan's* (in 1961) that should have commanded the Board's attention. Specifically, the Board did not evaluate whether the company could have avoided abrogating the collective bargaining agreement and terminating the employees had *it* sought to arbitrate the dispute. We turn now to a consideration of the developments in national labor policy which we believe militate against reliance solely on *Mastro Plastics* or *Arlan's* in determining whether the company's post-strike actions were permissible.

A.

Modern labor policy revolves around the collective bargaining agreement. If the agreement is violated, the aggrieved party may bring suit pursuant to Section 301(a) of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185(a). The "substantive law to apply in suits under § 301(a) is federal law, which the courts must fashion from the policy of our national labor laws", *Textile Workers* v. *Lincoln Mills*,

353 U.S. 448, 456 (1957), even if the suit is prosecuted in state court, *Humphrey* v. *Moore*, 375 U.S. 335, 343-44 (1964). *Lincoln Mills* specifically held that a union could obtain specific performance of an employer's promise to arbitrate grievances under Section 301(a),[9] irrespective of the requirements of Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107. 353 U.S. at 459. Speaking for the Court, Justice Douglas wrote:

> the Senate Report . . . summed up the philosophy of § 301 as follows: "Statutory recognition of the collective agreement as a valid, binding, and enforceable contract is a logical and necessary step. It will promote a higher degree of responsibility upon the parties to such agreements, and will thereby promote industrial peace."
>
> Plainly the agreement to arbitrate grievance disputes is the *quid pro quo* for an agreement not to strike. Viewed in this light, the legislation does more than confer jurisdiction in the federal courts over labor organizations. It expresses a federal policy that federal courts should enforce these agreements on behalf of or against labor organizations and that industrial peace can be best obtained only in that way.

[9] Justices Burton and Harlan disagreed with the proposition that federal law was the substantive law to be applied in a Section 301 suit, but concurred in the result on the ground that "[t]he power to decree specific performance of a collectively bargained agreement to arbitrate finds its source in § 301 itself, and in a Federal District Court's inherent equitable powers, nurtured by a congressional policy to encourage and enforce labor arbitration in industries affecting commerce." 353 U.S. at 460 (footnotes omitted). Justice Frankfurter filed his classic dissent.

> To be sure, there is a great medley of ideas flected in the hearings, reports, and debates on this Act. Yet, to repeat, the entire tenor of the history indicates that the agreement to arbitrate grievance disputes was considered as *quid pro quo* of a no-strike agreement. And when in the House the debate narrowed to the question whether § 301 was more than jurisdictional, it became abundantly clear that the purpose of the section was to provide the necessary legal remedies.

Ibid. at 454-55.

B.

Three years after the *Lincoln Mills* decision, in the *Steelworkers Trilogy* [10] the Court enunciated the now well-known presumption of arbitrability for labor disputes:[11]

> An order to arbitrate the particular grievance should not be denied unless it may be said with

[10] *United Steelworkers of America* v. *American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960).

[11] As the Court stated in *Gateway Coal Co.* v. *UMW*, 414 U.S. 368, 377 (1974), the "federal policy favoring arbitration of labor disputes is firmly grounded in congressional command. Section 203(d) of the Labor Management Relations Act, 29 U.S.C § 173(d), states in part:

> Final adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement."

> positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.

United Steelworkers of America v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960) (footnote omitted). Thus, the arbitral forum is the primary arena for the settlement of labor disputes.[12] Murphy & Sterlacci, *A Review of the National Labor Relations Board's Deferral Policy*, 42 FORDHAM L. REV. 291, 300 (1973). As the Court recently observed, the *Steelworkers Trilogy* also elaborated the basis for the policy—"that commercial arbitration and labor arbitration have different objectives. In the former case, arbitration takes the place of litigation, while in the latter 'arbitration is the substitute for industrial strife.'" *Gateway Coal Co.* v. *UMW*, 414 U.S. 368, 378 (1974), quoting *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.*, *supra*, 363 U.S. at 578.

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[12] The NLRB itself has adopted a policy whereby it defers 8(a)(5) cases to the arbitral process when the collective bargaining agreement provides for arbitration. *Collyer Insulated Wire*, 192 N.L.R.B. 837 (1971). Those circuits which have reviewed this policy have embraced it. *Local 2188, IBEW* v. *NLRB*, 494 F.2d 1087 (D.C. Cir.), *cert. denied*, 419 U.S. 835 (1974); *Associated Press* v. *NLRB*, 492 F.2d 662 (D.C. Cir. 1974); *Nabisco, Inc.* v. *NLRB*, 479 F.2d 770 (2d Cir. 1973); *see* cases cited in *Associated Press, supra*, 492 F.2d at 668 n.24. *But cf. NLRB* v. *Railway, Airline & Steamship Clerks*, 498 F.2d 1105, 1109-10 (5th Cir. 1974). We have not yet had occasion to address the merits of the *Collyer* doctrine and hereby express no opinion thereon. *See generally* Murphy & Sterlacci, *A Review of the National Labor Relations Board's Deferral Policy*, 42 FORDHAM L. REV. 291 (1973).

C.

Boys Markets, Inc. v. *Retail Clerks Union*, 398 U.S. 235 (1970), extended the theories of both *Lincoln Mills* and the *Steelworkers Trilogy*. *See ibid.* at 241-44, 248. Reasoning that the literal, anti-injunction terms of the Norris-LaGuardia Act must be accommodated with the subsequently enacted Section 301 of the Labor-Management Relations Act and the purposes of labor arbitration, the Court held that Section 301 authorized injunctions against strikes in violation of contracts that called for arbitration of the underlying grievances. In so ruling, the Court emphasized that "consideration must be given to the total corpus of pertinent law and the policies that inspired ostensibly inconsistent provisions.' *Ibid.* at 250.

Several threads of rationale run through *Boys Markets*. First, the importance of arbitration "as an instrument of federal policy for resolving disputes between labor and management". *Ibid.* at 243. Second, the availability, at least theoretically, of disparate remedies in state as opposed to federal courts under then-existing law. *Ibid.* at 243-46. Third, the reaffirmation that a no-strike clause is a *quid pro quo* for an employer's agreement to submit disputes to arbitration, coupled with the realization that if the no-strike clause were not enforceable, there would be little incentive for management to agree to arbitration. *Ibid.* at 247-48. Fourth, the belief that an accommodation between the Norris-LaGuardia Act and Section 301 was appropriate because "[a]s labor organizations grew in strength and developed toward maturity, congressional emphasis

shifted from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Ibid.* at 251.

Thus, *Boys Markets* sanctioned judicial enforcement of a no-strike clause given as a *quid pro quo* for an arbitration clause that is specifically enforceable on the authority of *Lincoln Mills*; so viewed, it is the corollary of *Lincoln Mills*. At the same time, a *Boys Markets* injunction is predicated on submission of the underlying dispute to the arbitral forum; accordingly, *Boys Markets* advances the *Steelworkers* principles as well.

D.

The *Boys Markets* Court characterized its opinion as "a narrow one"; the Court dealt "only with the situation in which a collective-bargaining contract contains a mandatory grievance adjustment or arbitration procedure," 398 U.S. at 253, and an explicit no-strike clause. The more recent *Gateway Coal Co.* v. *UMW*, *supra*, indicates that, although the *Boys Markets* holding may have been narrow, its impact is to be far greater. Specifically, the *Gateway* Court held that "injunctive relief also may be granted on the basis of an implied undertaking not to strike", as well as a specific no-strike clause, 414 U.S. at 381. Second, the Court held that this court had erred in limiting the presumption of arbitrability to disputes over economic matters; strikes precipitated by safety disputes also could be enjoined. *Ibid.* at 379-80.[13]

[13] *Gateway* led one commentator to conclude that the Court had added to the "presumption of arbitrability" a "presumption of enjoinability for all labor disputes". 63 GEO. L.J. 275 (1974).

E.

As we understand these recent Supreme Court teachings, the basic tenets of contemporary labor policy may be summarized as follows:

(a) Today's interdependent and technologically advanced economy dictates that labor-management relations be as peaceful as possible. *See* Gould, *On Labor Relations, Unions, and the Judges: The* Boys Market *Case*, 1970 SUP. CT. REV. 215, 267 (P. Kurland ed.) [hereinafter cited as Gould].

(b) Where labor and management agree on a forum for the peaceful resolution of disputes, that agreement should be honored and may be enforced by an injunction, mandating resort to that forum. *Boys Markets, supra; see The Supreme Court, 1969 Term*, 84 HARV. L. REV. 30, 199 (1970); Note, *Giving Strength to the No-Strike Clause: Accommodation to Allow Federal Injunctions*, 46 Notre Dame Law. 526, 541 (1971); Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1599 (1970).

(c) Arbitration is a favored alternative forum for dispute resolution. *Gateway, supra*, 414 U.S. at 377, 382; *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195, 226 (1962) (Brennan, J., dissenting) ("a kingpin of federal labor policy"); *Arlan's supra*, 133 N.L.R.B. at 808; *The Supreme Court, 1969 Term*, 84 HARV. L. REV. 30, 199 (1970); Note, *Labor Injunctions*, Boys Markets, *and the Presumption of Arbitrability*, 85 HARV. L. REV. 636, 637 (1972).

(d) Congressional emphasis in labor legislation has shifted "from protection of the nascent labor movement to the encouragement of collective bargaining and to administrative techniques for the peaceful resolution of industrial disputes." *Gateway, supra,* 414 U.S. at 381; *Boys Markets, supra,* 398 U.S. at 251; *see* Gould 236; *The Supreme Court, 1969 Term,* 84 HARV. L. REV. 30, 200-01 (1970).

In our prior decisions, we have sought to adhere to these principles. *Parade Publications, Inc.* v. *Philadelphia Mailers Union No. 14,* 459 F.2d 369, 374 (3d Cir. 1972), recognized the limitation to *Boys Markets,* namely "that arbitration should be encouraged by permitting judicial enforcement of a 'no-strike' clause when the underlying issue is arbitrable, but that there should be no injunction if the underlying dispute is not arbitrable." This court, however, has not been hesitant to find arbitrability. For example, in *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs Local 926,* 502 F.2d 321 (3d Cir.) (in banc), *cert. denied,* 419 U.S. 1049 (1974), a labor agreement contained a no-strike clause and a provision that the agreement would not be violated if "an employee honored a primary picket line." *Ibid.* at 323. The parties disagreed whether the picket line honored was primary or secondary. Reasoning that "[r]equiring arbitration does not nullify the union's right to honor a primary picket line, but only suspends the exercise of the right until its existence is established by an arbitrator's decision," *ibid.* at 324, we held that the dispute was covered by the contractual undertaking to arbitrate. Accordingly, we affirmed the district court's issuance of a *Boys Markets* injunction. *Island Creek Coal Co.* v. *UMW,*

507 F.2d 650 (3d Cir.), *cert. denied,* —— U.S. ——, 44 U.S.L.W. 3206 (Oct. 6, 1975), extended this rule to a labor agreement in which there was neither an express no-strike clause nor a contractual reference to honoring picket lines. *Ibid.* at 652.[14] More recently, in the context of a Section 301 damage action, we held that the question of whether the collective bargaining agreement had been repudiated was one for the arbitrator. *Controlled Sanitation Corp.* v. *Dist. 128, International Ass'n of Machinists,* —— F.2d ——, No. 74-1714 at 13 (3d Cir., Oct. 17, 1975).

We turn to consider, on the facts of the instant case and with respect to the company's post-strike actions, the appropriate accommodation between these general principles and the older rules of *Mastro Plastics* and *Arlan's.*

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[14] *Island Creek* articulated a significant distinction:

> Whatever difficulties there may be concerning the scope of the remedy recognized in *Boys Markets,* there would, we assume, be a high degree of unanimity in support of the proposition that if the contract gives the union and the employees the right to grieve and arbitrate a given dispute that remedy must be pursued in preference to a work stoppage. Thus the initial inquiry should not be whether the employer is entitled to an injunction, but rather, whether the underlying dispute is one which the union and the employees could grieve and arbitrate.

507 F.2d at 652 (citation omitted). Subsequently, we gave substance to this distinction by vacating a *Boys Markets* injunction while endorsing the district court's ordering of resort to the grievance procedures. *Jones & Laughlin Steel Corp.* v. *UMW,* 519 F.2d 1155, 1158-59 (3d Cir. 1975).

V.

Here, first the union and then the company resorted to the tooth and claw of industrial warfare, rather than availing themselves of procedures provided in their collective bargaining agreement and encouraged by the congressionally mandated national labor policy. The union failed to complete the grievance procedure and to invoke arbitration; instead it struck to protest what it considered an unfair labor practice. The company disdained the available arbitral forum and ultimately resorted to rescission of the contract, to discharge of the employees and to termination of the collective bargaining relationship. A more primitive, abrasive and disrupting example of labor-management relations is difficult to imagine. Indeed, the avoidance of such traumatic ruptures in industrial relations is the precise aim of the national labor policy. Yet the Board and the intervenor-company would have us hold that the national labor policy will sanction the company's ultimate actions.

A.

The Supreme Court has instructed since *Lincoln Mills* that a union's no-strike pledge is usually given as a *quid pro quo* for the company's promise to arbitrate specified disputes. The union can compel arbitration, *Lincoln Mills*, *supra*, and the employer can enjoin a strike in violation of the no-strike clause, *Boys Markets*, *supra*. When an employer seeks to enjoin such a strike, the task of the court is two-fold: (a) to determine whether the parties have agreed to arbitrate the underlying dispute;[15] (b) if

[15] This task in turn involves determining (a) whether the parties agreed to arbitrate generally and (b) whether the agreement to arbitrate is susceptible of an interpretation that covers the specific dispute.

so, whether the employer is entitled to an injunction.[16] *Island Creek Coal Co.* (*supra* n.14); *see Gateway, supra*, 414 U.S. at 374.

[16] The district court must "consider whether issuance of an injunction would be warranted under ordinary principles of equity—whether breaches are occurring and will continue, or have been threatened and will be committed; whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance." *Boys Markets, supra*, 398 U.S. at 254; *see Gateway, supra*, 414 U.S. at 387-88. We have suggested previously that a rupture in the *status quo* of working conditions during grievance and arbitration proceedings may constitute irreparable harm to a union *qua* union. *Newspaper Delivery Drivers, Local 211* v. *Pittsburgh Press Co.*, No. 72-2141 (3d Cir., Dec. 26, 1972). We have no occasion at this time to decide whether a company could prove irreparable injury on an analogous theory.

See also Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1599 (1970) ("the power should be limited to those situations where the policies of ensuring industrial peace through arbitration and of promoting freedom of contract by enforcing collective bargaining agreements *both* clearly support the granting of an injunction"); 88 HARV. L. REV. 463, 470 (1974) (suggesting as a further requirement a finding of probable success on the merits).

The procedural requirements of Section 7 of the Norris-LaGuardia Act, 29 U.S.C. § 107, remain applicable so far as consistent with the policies of Section 301. *Celotex Corp.* v. *Oil, Chemical & Atomic Workers*, 516 F.2d 242, 246 (3d Cir. 1975). For the proposition that Sections 7-12 inclusive of the Norris-LaGuardia Act, 29 U.S.C. §§ 107-112, provide safeguards against improper restraining orders see Note, *The New Federal Law of Labor Injunctions*, 79 YALE L.J. 1593, 1606-08 (1970).

Given *quid pro quo* arbitration and no-strike provisions in a collective bargaining agreement, we would have no difficulty in concluding that an employer's failure to seek a *Boys Markets* injunction against a strike violating a no-strike clause would be an appropriate factor to consider in determining whether subsequent actions were permissible under the National Labor Relations Act. Thus, the availability of a *Boys Markets* injunction effects a *pro tanto* modification of the *Arlan's* rule. A contrary conclusion would be a total perversion of the national labor policy espoused by Congress and the Supreme Court.

B.

Here, however, the arbitration process was elective, not mandatory. The arbitration provision of the contract, *see* n.4 *supra*, was not coextensive with the no-strike clause. Arbitration could occur only upon written consent of both the union and the company. We are also mindful that "[n]o obligation to arbitrate a labor dispute arises solely by operation of law." *Gateway*, *supra*, 414 U.S. at 374; *see Local 103, Electrical, Radio & Machine Workers* v. *RCA Corp.*, 516 F.2d 1336, 1339 (3d Cir. 1975). Accordingly, we agree that a *Boys Markets* injunction against the strike and requiring arbitration was unavailable to the company as a remedy.

Although arbitration was not compulsory, compliance with the grievance procedure was mandatory. The preamble to the grievance article stated in pertinent part:

> It is the intent of this article to provide an efficient means of satisfactorily adjusting com-

> plaints and grievances at the job level. To that end it is agreed that the following steps shall be followed in numerical order so that both the Union and the Company strive for an early settlement at the lowest level within this procedure.

App. at 296a. The contract also barred strikes, *inter alia*, unless and until the grievance procedure had been completed. *See* pp. 3-4 *supra*. Thus, the contract contained a more limited *quid pro quo* arrangement than usual: the union agreed not to strike during the grievance procedure; in return, the company agreed to follow the grievance procedure and to "strive for an early settlement at the lowest level within this procedure." As the dispute developed, however, the union struck on the day the company planned to implement the schedule change; the company did not write its Step 4 "disposition" until several days later. App. at 150a; 320a-24a. The company took no further action with regard to its duty to follow the grievance procedure.[17] Significantly, it did not seek specific enforcement of the agreement to follow the grievance procedure. *See Lincoln Mills*, *supra*, 353 U.S. at 454; *Jones & Laughlin Steel Corp.* v. *UMW*, 519 F.2d 1155 (3d Cir. 1975).

Furthermore, even though *Boys Markets* was unavailable to the company to compel arbitration, the arbitral forum was not closed to the company. Arbitration was available when the grievance procedure

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[17] We do not deem it necessary to reach the question whether the company could have obtained a *Boys Markets*-type injunction pending compliance of the compulsory grievance provisions.

"fail[ed] to resolve a problem involving . . . the interpretation of any provision of this agreement." The underlying dispute in the instant case revolved around the interpretation of the management-rights clause. Therefore, the problem clearly was susceptible to resolution in the arbitral forum. *See* n.15 *supra*. The only stumbling block to submission of the dispute to arbitration was the consent of the parties. The union had indicated its desire to arbitrate; the company never affirmatively sought arbitration.

The company did send several letters to union members, *inter alia*, asking them to encourage their leaders "to return to the legal and . . . right means of solving this problem." *See* App. at 409a. We see nothing in these letters approaching a written consent to arbitration. *See ibid.* at 341a-47a. On July 26, 1971, the company wrote the Connecticut Labor Commissioner a letter stating, *inter alia*, "The Dow Chemical Company hereby notifies you, as Labor Commissioner of the State of Connecticut, of its willingness to submit the labor dispute resulting in said strike or walkout to arbitration or mediation." *Ibid.* at 348a. There is nothing in the record to indicate that the union received this communication, which might be read as a consent to arbitration sufficient under the collective bargaining agreement, before the company terminated the collective bargaining agreement on August 9, 1971. *See ibid.* at 162a-65a, especially at 164a. *See also ibid.* at 209a-10a.

Twice during the Step 4 meeting the union representative suggested that the issue be submitted to arbitration immediately, bypassing Step 5. In one case the company representative said "stick to the

grievance procedure", and in the other the company representative did not give a direct answer. *Ibid.* at 145a-48a; 197a-201a. At the end of the Step 4 meeting, the union representative told the company representative not to put the schedule change into effect, but to settle the dispute in court or through arbitration. *Ibid.* at 200a. The company pursued neither alternative.

Accordingly, we believe that, although *Boys Markets* was unavailable to the company to compel arbitration, this conclusion begs the pivotal question: whether the company, having failed to take positive steps to have the dispute resolved peacefully, can build a sanctuary for subsequent actions in derogation of its previously harmonious relationship with the union. As a practical matter, had the company sought a peaceful and orderly resolution of the underlying dispute, it is highly probable that the union would have at least suspended the strike.

Reducing this case to its bare essentials, we observe that labor and management agreed to grieve disputes and to submit disputes to the arbitral forum upon consent; that management never sought to force completion of the grievance procedure; that management did not communicate to the union before terminating the contract its consent to arbitrate; and that industrial strife ensued. The company could have compelled completion of the grievance procedure or communicated to the union its consent to arbitration, and thereby avoided these traumatic ruptures. We therefore hold that, in evaluating the company's post-strike actions, the Board should have considered as a factor the company's failure to seek peaceful resolu-

tion through the grievance procedure and in the arbitral forum.

C.

The decision we reach today is guided in the first instance by jurisprudential guideposts in recent Supreme Court pronouncements on national labor policy. But prudential considerations also have influenced our disposition. We have grave doubts that the Board's resort to the *Mastro Plastics/Arlan's* formula furthers the cause of industrial peace. The principals to a labor dispute cannot know with any degree of certainty whether the Board will deem a company's actions unfair labor practices and, if so, whether it will label them "serious" or "nonserious". The answers, like beauty, may lie in the eye of the beholder.[18] Under the Board's decision in this case, the union that chooses to strike because it believes (1) the company has committed an unfair labor practice and (2) it is a "serious" one, may find itself ousted as a collective bargaining agent and its members terminated if a majority of the Board, upon detached reflection, disagrees with only the second conclusion.

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[18] The record before us demonstrates that no bright line of demarcation separates the two types of unfair labor practices. Of three distinguished, expert members of the Board, two found the company's unilateral decision to change the work shifts to be a "nonserious" violation of Section 8(a)(5). A third member found that, "even applying the test of 'experience, good sense, and good judgment' of the majority opinion in *Arlan's*, the unfair labor practice committed by [the company] must be judged sufficiently serious to warrant the employees taking concerted action outside the grievance-arbitration provisions of the contract." App. at 442a (Member Fanning, dissenting).

The Board has said that the "test [it] has to apply in most of its cases [is] experience, good sense, and good judgment"; "[i]n this field, lines between the licit and illicit can rarely be drawn clearly in advance. And in the penumbral areas which are omnipresent, there is no substitute for niceties of judgment." *Arlan's*, *supra*, 133 N.L.R.B. at 807. While we agree with these sentiments in principle, we emphasize the importance of constricting the numbers and contours of "penumbral areas". Industrial peace requires that companies and unions alike extract maximum stability, predictability, and reckonability from labor board decisions. Labor and management have the right to understand labor law in the context of a paraphrase of Holmes' aphorism: "The prophecies of what the [NLRB] will do in fact, and nothing more pretentious, are what I mean by the law [of labor]." Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897). Under our decision, a union will still be placed on the horns of a dilemma when it believes the employer has committed an unfair labor practice. The company faced with a resultant strike, however, will know that it should take certain precautions before resorting to such self-help as cancellation of the contract, termination of employees and refusal to recognize the union.

While seeking to further the interests of stability, predictability and reckonability in the area of labor law, our decision does not detract from the important role of the Board in formulating and administering national labor policy. We recognize that a dispute, such as that underlying this case, involving a claimed unfair labor practice is within the Board's primary jurisdiction. *San Diego Bldg. Trades Council* v. *Gar-*

mon, 359 U.S. 236 (1959). As noted above, however, the Board itself has adopted a policy of deferring certain Section 8(a)(5) charges to the arbitral forum. *See* n.12 *supra*. Moreover, although an issue may be within the Board's exclusive jurisdiction, if it arises in the context of a breach of the collective bargaining agreement, it falls within the jurisdiction of the federal courts under Section 301. *Smith* v. *Evening News Ass'n*, 371 U.S. 195 (1962). Under our decision, the Board may play a key role in future disputes such as that at bar. If a union strikes to protest an alleged unfair labor practice, and if the company counters by seeking a *Boys Markets* injunction, the federal court may require the posting of a bond, may preliminarily enjoin the strike, and may solicit the expertise of the Board in the form of an amicus brief. *See* Gould 257-58. Such a solution will further the national labor policy favoring peaceful resolution of most labor disputes through the arbitral forum, while safeguarding the union's interests in protecting its organizational integrity from major employer unfair labor practices as recognized in *Mastro Plastics, supra.*

VI.

One other aspect of the Board's decision requires comment. The administrative law judge found that the union's strike in breach of the contract justified the company's unilateral cancellation of the entire collective bargaining agreement. As primary authority, he relied on *Marathon Elec. Mfg. Co.*, 106 N.L.R.B. 1171 (1953), *enforced sub nom. United Elec., Radio & Machine Workers* v. *NLRB*, 223 F.2d 338 (D.C. Cir. 1955), *cert. denied*, 350 U.S. 981 (1956). Just as we believe recent developments in

labor law have depleted the force of the *Mastro Plastics/Arlan's* formulation, so also we believe that strict application of the doctrine of material breach derived from contract law is inconsistent with contemporary national labor policy.

At the outset we observe that *Children's Rehabilitation Center, Inc.* v. *Service Employees*, 503 F.2d 1077 (3d Cir.), *cert. denied*, 419 U.S. 1090 (1974), is not to the contrary. There, the union had acquiesced in the company's termination of the labor contract, *ibid.* at 1079, and the sole issue before the court was whether the employer could recover in a Section 301 suit damages for the period between the initial breach of the agreement and the company's termination. Our narrow holding was that "the loss of the right [the company] otherwise would have to collect damages for a breach is not an unfair price for an employer to pay if it insists upon total and permanent relief from the obligations it accepted under a labor contract." *Ibid.*

In the more general circumstances presented here, we agree with the views expressed by Chief Judge Seitz. *Ibid.* at 1080. Indeed, the concerns there expressed are identical to those more fully set forth in Part IV *supra*. Accordingly we disapprove the rule that holds a strike in breach of a contract automatically gives the employer the right to terminate the contract. As Professor Cox observed some years ago in criticizing the *Marathon Electric* rule:

> A collective bargaining contract is made to be broken. The number of people involved, both as employees and as supervisors, makes large and small violations inevitable. This is one reason

for the grievance procedure and arbitration. Collective agreements are negotiated for substantial periods after much travail. There are enormous pressures to reach agreement. There will be no rules to govern the enterprise if the contract is set aside. These are proper factors to evaluate in determining whether a breach is material. They *argue for continuing the contract and leaving the injured party to his legal or contractual remedies.* Consequently, I am skeptical of the trend toward holding that a strike in breach of contract automatically gives the employer the right to terminate the agreement. There would seem to be room for judgment based upon the length of the strike, the number of employees affected, the injury to the employer, *the degree of fault upon the part of the union,* and the likelihood that the contract will be honored for the remainder of its term.

Cox, *The Legal Nature of Collective Bargaining Agreements*, 57 MICH. L. REV. 1, 18-19 (1958) (footnote omitted and emphasis added).[19]

Here, the company had both legal and contractual remedies available to it short of contract termination. Legally, it could have compelled completion of the grievance procedure or filed a Section 301 damage suit. Under the contract, it could have taken affirmative steps to have the underlying dispute submitted to arbitration. It did neither. In its brief, the NLRB appears to cast total blame for this rupture in labor relations on the union. The Board says the

[19] *See also* Feller, *A General Theory of the Collective Bargaining Agreement,* 61 CALIF. L. REV. 663 (1973), especially at 797-99 & n.522.

union "refus[ed] to fully process the grievance [thereby] preclud[ing] an orderly resolution of the dispute." Brief for NLRB at 29; *see ibid.* at 30. This analysis, however, does not reach "the *degree* of fault upon the part of the union". As recited at length in Part V *supra*, it was the company's reluctance to arbitrate which precluded a peaceful resolution of the underlying dispute. Indeed, it was the company's unfair labor practice that precipitated the strike. Now, it is the company's theory which would pervert the national labor policy. We decline the invitation to contribute to such a result. In short, analogies between contract principles and the law of labor agreements are helpful to a point; when an analogy would dictate a result contrary to the paramount interests in labor peace, however, it should not control. *See United Steelworkers of America* v. *Warrior & Gulf Navigation Co., supra,* 363 U.S. at 578-81 (1960).

VII.

To summarize, the polestars of the national labor policy today are that industrial strife is to be avoided and that arbitration or alternative peaceful conflict resolutions are to be favored. The contract between the union and the company prohibited strikes unless and until a grievance and arbitration procedure had been exhausted. The union struck prematurely. The company then joined the union in resort to the tooth and claw of industrial warfare when it might as easily have turned the other cheek and taken affirmative steps to get the dispute back in the available arbitral forum. The Board reasoned that the strike was an unprotected, material breach of the contract because the company's initial unfair labor practice

was "nonserious"; it overlooked the company's failure to resort to available, peaceful alternatives. In light of recent trends in labor policy, we find error in this oversight. We, therefore, will grant the petition to review the order of the Board and will deny the cross-application for enforcement of the Board's order. In the view we take, we do not disturb the Board's conclusion that the company violated Sections 8(a)(5) and 8(a)(1) by unilaterally announcing and scheduling a change in the work schedule of latex department employees. We will remand for reconsideration of all other aspects of the proceedings in accordance with the foregoing.

A True Copy:

Teste:

Clerk of the United States Court of Appeals for the Third Circuit.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2163

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

and

THE DOW CHEMICAL COMPANY,
Intervenor.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge*, and ALDISERT, ADAMS, GIBBONS, ROSENN, HUNTER, WEIS and GARTH, *Circuit Judges.*

The petition for rehearing filed by The Dow Chemical Company, Intervenor, in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
Judge

Dated: April 2, 1976

Judge Rosen would grant the petition.

Judge Van Dusen did not participate in the consideration of this matter.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[Received Jan 26, 1976, U.S.C.A., 3rd. Cir.]

No. 74-2163

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

and

THE DOW CHEMICAL COMPANY,
Intervenor.

JUDGMENT

Before: ALDISERT, GIBBONS and WEIS, Circuit Judges.

THIS CAUSE came on to be heard upon a petition filed by United Steelworkers of America, AFL-CIO-CLC, to review an order of the National Labor Relations Board issued June 28, 1974, dismissing the complaint against the Dow Chemical Company. The Court heard argument of respective counsel on September 11, 1975, and has considered the briefs and transcript of record filed in this cause. On January 8, 1976, the Court, being fully advised in the premises handed down its opinion denying the Board's dismissal of the complaint and remanding the case to the

Board for reconsideration in accordance with the Court's opinion.

ORDERED AND ADJUDGED by the Court that the case be and it is hereby remanded to the Board for reconsideration in accordance with the Court's opinion.

IT IS FURTHER ORDERED that costs shall be taxed against the Respondent.

BY THE COURT

/s/ Aldisert
Circuit Judge

DATED: February 11, 1976

Certified as a true copy and issued in lieu of a formal mandate on April 13, 1976.

Test:

THOMAS F. QUINN
Clerk, United States Court of Appeals
for the Third Circuit

Costs taxed in favor of petitioner as follows:

Brief	$ 234.57
Appendix	1,363.95
Reply Brief	125.90
Clerk's Fees	50.00
TOTAL	$1,774.42

APPENDIX D

FKP

212 NLRB No. 50

D—8810
Ledyard, Conn.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD

Cases 1—CA—7736 and
1—CA—7821

THE DOW CHEMICAL COMPANY

and

UNITED STEELWORKERS OF AMERICA, AFL-CIO-CLC
(formerly International Union of District 50, Allied and Technical Workers of the United States and Canada)

and

Case 1—CA—7873

WILLIAM J. KEITH, an Individual

DECISI0N AND ORDER

On October 30, 1973, Administrative Law Judge John P. von Rohr issued the attached Decision in this proceeding. Thereafter, General Counsel, Respondent, and Charging Party each filed exceptions and supporting briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings, and conclusions of the Administrative Law Judge and to adopt his recommended Order.

ORDER

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as its Order the recommended Order of the Administrative Law Judge and hereby orders that the complaint be, and it hereby is, dismissed in its entirety.

Dated, Washington, D.C. June 28, 1974

RALPH E. KENNEDY, Member

JOHN A. PENELLO, Member

NATIONAL LABOR RELATIONS BOARD

[SEAL]

MEMBER FANNING, dissenting in part:

I agree with my colleagues in their adoption of the Administrative Law Judge's findings that Respondent unilaterally announced and scheduled the change in the work shift from a 7-consecutive-days-on-and-2-days-off workweek to a 5-consecutive-days-on-and-2-days-off workweek in violation of Section 8(a)(5) and (1) of the Act. However, unlike my colleagues, I find that a cease-and-desist order is needed to remedy such violation and to guarantee that Respondent will bargain with the representative chosen by its employees.

Additionally, I disagree with my colleagues' adoption of the Administrative Law Judge's finding that the strike, beginning on June 7, 1971, was unprotected from its inception, because the Union failed to submit its dispute to arbitration in accordance with the grievance and arbitration provisions of the existing contract, which also contained a no-strike clause,[1] and that Respondent's unilateral conduct, although it constituted an unfair labor practice, was not of such serious nature as to destroy the basis for collective bargaining.

As found by the Administrative Law Judge, Respondent unilaterally and unlawfully announced that

[1] The no-strike clause in the contract provides that the Union may engage in strike action after all steps of the grievance and arbitration provisions of the contract have been exhausted. The contract also provides, in addition to the five steps set forth in the grievance procedure, that the Union may not engage in a strike unless or until the Union has made a written request for arbitration after receipt of the step 5 answer, and arbitration has either been completed or refused by the Employer.

it would make changes in the work schedule which would affect 16 of the 19 employees working in its latex department. Such changes, the record shows, would have resulted in the reduction of the hourly rate of at least one employee, the senior head operator whose position would be eliminated causing him to be transferred to a new position which paid 18 cents less per hour. Additionally, the record contains the testimony of Gay, the latex department superintendent, who testified that, because of the reduction of hours worked and the elimination of overtime, weekend, and holiday premiums, he estimated the remainder of the employees in the latex department would earn approximately $570 less per year as a result of the announced change in schedule from a 7-consecutive-days-on-and-2-days-off workweek to a 5-consecutive-days-on-and-2-days-off workweek.

Respondent's unlawful unilateral announcement of such proposed changes in working hours, which would have resulted in considerable loss of remuneration on the part of the employees, must necessarily have been viewed by the employees as a grave violation of the bargaining obligations required of Respondent under the Act.

In *Arlan's Department Store*,[2] I dissent from the majority's affirmance of the Trial Examiner who had found that employees who had walked out, notwithstanding the no-strike clause in the contract, to protest the discharge of a steward, had not been engaged in protected concerted activity and could lawfully be discharged. The majority therein noted its

[2] *Arlan's Department Store of Michigan Inc.*, 133 NLRB 802.

refusal to accept a broad interpretation of the Supreme Court's decision in *Mastro Plastics*[3] and stated that the Court had merely rejected the extreme application which the employers sought to give to the general no-strike clause in their contract and upheld the Board's finding that the clause in question did not constitute a waiver of the employees' right to strike in protest against employer unfair labor practices characterized by the Court as "flagrant." Thus, the majority indicated that it would apply the test of experience, good sense, and good judgment and would find that only strikes in protest against serious unfair labor practices should be held immune from general no-strike clauses.

The discharge in *Arlan's* was held, by the majority, to be a serious matter only to the individual involved, since the discharge was a result of a clash of personalities. Thus, the majority noted, such dispute, although constituting an unfair labor practice, should have been submitted to the contract grievance procedure. Moreover, the majority reasoned that such dispute was not serious in the sense noted by the Court in *Mastro Plastics;* i.e., "destructive of the foundation on which collective bargaining must rest."

Although the facts in this case are somewhat different than *Arlan's*, I find that the views set forth in my dissent therein are equally applicable. In *Arlan's*, I interpreted *Mastro Plastics* as holding that a general no-strike clause in a contract for the term of that contract bars only the right to strike over disputes concerning the economic relationship between

[3] *Mastro Plastics Corp., and French-American Reeds Manufacturing Company, Inc.* v. *N.L.R.B.*, 350 U.S. 270.

the employers and their employees, i.e., an economic strike, and does not bar a strike to protest unfair labor practices in the absence of an express waiver, since such strike, in my view, is outside the scope of the contract. In other words, it is my view that *Mastro Plastics* emphasized that it is the (A) scope and coverage of the contract, and not (B) the degree and kind of unfair labor practices which may be involved, which determines whether the employees have engaged in protected activities.

Applying *Mastro Plastics* to this case leads me to conclude that as Respondent engaged in an unfair labor practice in making its unilateral announcement of change in work schedule and in adamantly refusing to negotiate concerning such change, the employees strike against this unfair labor practice [4] was

[4] It is of course clear that the employees went on strike in protest of Respondent's unfair labor practice. Thus, after Respondent announced its decision and refusal to negotiate concerning it, but indicated willingness to talk about the manner and timing of its implementation, the employees withheld strike action and attempted to utilize the grievance and arbitration procedures in an effort to get the decision changed. In practical effect they had exhausted those procedures when Respondent's officials flatly refused the Union's requests to agree to arbitrate the matter in a discussion initiated by Respondent's officials the day before they announced they were going to place the shift change into effect on June 7. The employees were apprised of all these developments, and struck rather than accept Respondent's unlawfully imposed change in rates of pay and conditions of employment. Even accepting my colleagues' premise that the strike violated the letter of the no-strike clause, the violation was technical in nature and does not warrant Respondent's rescission of the contract and withdrawal of recognition. *N.L.R.B.* v. *State Electric Service*, 477 F.2d (C.A. 5); *Local Union No.*

not barred by the no-strike clause in that contract and was protected activity. This being so, Respondent's discharge of the strikers and withdrawal of recognition from the Union were clearly in violation of Section 8(a)(1), (3), and (5) of the Act.

Moreover, even applying the test of "experience, good sense, and good judgment" of the majority opinion in *Arlan's*, the unfair labor practice committed by Respondent must be judged sufficiently serious to warrant the employees taking concerted action outside the grievance-arbitration provisions of the contract. The Respondent's unilaterally announced changes in the work shift schedules of the latex department involved the reclassification of some employees into lower paying classifications and substantial wage cuts for the other employees in the department. But the injury suffered by employees in the bargaining unit is not limited to this direct injury to virtually all the employees in the latex department. "For the real injury in this case is to the union's status as bargaining representative," [5] an injury affecting all employees in the bargaining unit.

721, United Packinghouse, Food & Allied Workers, AFL-CIO v. *Needham Packing Co. d/b/a Sioux City Dressed Beef*, 376 U.S. 247; *Drake Bakeries Inc.* v. *Local 50, American Bakery & Confectionery Workers International, AFL-CIO*, 370 U.S. 254.

[5] *N.L.R.B.* v. *C & C Plywood Corp.*, 385 U.S. 421. Moreover, in considering the seriousness of the unfair labor practice, it is relevant that the changes unilaterally made by Respondent were in essence the sort of changes which it unsuccessfully sought authority to make during collective-bargaining negotiations with the Union, and which it then vowed "to get during the life of this contract."

"Experience" informs us that wage reductions are among the most sensitive issues in labor relations. "Good sense" tells us that an unlawfully imposed wage cut will provoke employees into withholding their labor. "Good judgment" demands that before a no-strike clause be construed as applying to strikes protesting unfair labor practices there be clear and unmistakable language in the contract to that effect.[6] It demands as well consideration of the fact that the Union and the employees withheld strike action and continued to utilize the grievance provisions of the contract in an attempt to force the Respondent to the bargaining table up to the time that Respondent decided to implement the announced change. Considering these circumstances, it is clear that responsibility for the strike rests more upon Respondent as perpetrator of the unfair labor practice than upon the Union and the employees who sought to utilize peaceful means of securing their statutory rights and only desisted therein when brought face to face with a *fait accompli.* There are few actions more "destructive of the foundation upon which collective bargaining must rest" [7] than unilateral action which undermines the status and authority of the collective-bargaining representative.[8]

Accordingly, even on the basis of Arlan's, I find that the employees' strike was protected concerted

[6] *Mastro Plastics Corp., supra,* 283.

[7] *Mastro Plastics Corp., supra,* 281.

[8] Unless it be Respondent's subsequent action of terminating the unfair labor practice strikers and withdrawal of recognition of the Union as their collective-bargaining representative.

activity and did not violate the no-strike clause. For these reasons also, I would find that Respondent violated Section 8(a)(5) and (1) of the Act in unilaterally instituting the shift changes and in rescinding the contract and withdrawing recognition from the Union on August 8, 1971, and Section 8(a)(3) and (1) in terminating the employment of the striking employees because they refused to report to work on August 17, 1971.

Dated, Washington, D.C. June 28, 1974

JOHN H. FANNING, Member
NATIONAL LABOR RELATIONS BOARD

JD-659-73
New London, Conn.

UNITED STATES OF AMERICA
BEFORE THE
NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

Washington, D.C.

Case Nos. 1-CA-7736
1-CA-7821

THE DOW CHEMICAL COMPANY

and

UNITED STEELWORKERS OF AMERICA AFL-CIO-CLC
(formerly International Union of District 50, Allied and Technical Workers of the United States and Canada)

Case No. 1-CA-7873

THE DOW CHEMICAL COMPANY

and

WILLIAM J. KEITH, An Individual

Irwin P. Weiner, Esq., for the General Counsel.

Kenneth C. McGuiness and *Thomas W. Misner, Esqs.*, for the Respondent.

Warren H. Pyle, Esq. (of *Angoff, Goldman, Manning, Pyle & Wanger*), for the Charging Party.

DECISION

Statement of the Case

JOHN P. von ROHR, Administrative Law Judge: Upon charges filed commencing on June 30, 1971,[1] the General Counsel of the National Labor Relations Board, by the Regional Director for the First Region (Boston, Massachusetts) issued a consolidated complaint on May 8, 1973, against the Dow Chemical Company, herein called the Respondent or the Company, alleging that it had engaged in unfair labor practices within the meaning of Section 8(a)(1), (3) and (5) of the National Labor Relations Act, as amended, herein called the Act. The Respondent filed an answer denying the allegations of unlawful conduct alleged in the complaint.

Pursuant to notice, a hearing was held before Administrative Law Judge John P. von Rohr in New London, Connecticut, on July 10, 11, 12 and 13, 1973. Briefs were received from the General Counsel, the Charging Party and the Respondent on September 10, 1973, and they have been carefully considered.

Upon the entire record in this case and from my observation of the witnesses, I hereby make the following:

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[1] A charge and an amended charge were filed in Case No. 1-CA-7736 on June 30, 1971 and on December 21, 1972, respectively. The charge in Case No. 1-CA-7821 was filed on August 20, 1971 and the charge filed in Case No. 1-CA-7873 was filed on September 17, 1971.

Findings of Fact

I. The Business of the Respondent

The Respondent is a Delaware corporation with its principal office and place of business located in Midland, Michigan. Although it maintains plants throughout the United States, the only facility involved in this proceeding is its plant located at Allyn's Point, Ledyard Connecticut, where it is engaged in the manufacture of plastics and other chemical products. During the year preceding the hearing herein, this plant shipped products valued in excess of $50,000 to points and places located outside the State of Connecticut. During the same period it received goods and materials valued in excess of $50,000 from points and places outside the State of Connecticut. Respondent concedes, and I find, that it is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

II. The Labor Organization Involved

United Steelworkers of America, AFL-CIO-CLC (formerly International Union of District 50, Allied and Technical Workers of the United States and Canada), is a labor organization within the meaning of Section 2(5) of the Act.

III. The Unfair Labor Practices

A. *Events Prior to the Strike Commencing on June 7, 1971*

With but the few exceptions as will be noted, the facts in this case are not in dispute. The only plant involved herein is Respondent's facility located at Allyn's Point, Ledyard, Connecticut, where it is engaged in the manufacture of plastics and related products. The Respondent has recognized the Union as the collective-bargaining agent for the hourly rated (production) employees at this plant since approximately 1954. The effective contract dates of the last of a series of collective-bargaining agreements were from February 23, 1970 to February 26, 1973.

At the times material hereto, the Company employed approximately 145 employees, of whom 19 were employed in the latex department, which is the department where the dispute herein arose. The manufacturing process in this department, described as a basically "batch operation" begins with the introduction of various chemicals into large tanks called reactors. When the chemical process is completed, the liquid is transferred into a distillation unit and is then transferred into a cooling tank. It is then pumped to a holding tank where the latex is tested, filtered and put into storage tanks. Martin Gay, who at all times material hereto was superintendent of this department, described this largely automated process as "basically, loading the kettle, watching the reactions, controlling the addition of ingredients, and then making the transfers down through the process."

Prior to the occasion of the instant dispute, 16 of the 19 employees in the latex department worked a "7 and 2" schedule, i.e., they worked for 7 consecutive days and then had 2 days off. As will be discussed in greater detail below, in about the middle of May 1971, Respondent reached a decision to change this schedule to a regular 5 day workweek i.e., to a "5 and 2" schedule.[2] To accomplish this without lay-

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[2] Although the reason for the change is perhaps immaterial, I have no doubt that it was premised on valid economic and

ing off any of the employees, this change would involve the adding of an additional reactor cooler operator to each shift, the reduction of head operators from 4 to 3, reduction of drummer filter operators and latex testers from 4 to 3, respectively, and the adding of one handyman, all of which is illustrated as follows:

	7 & 2 Shift		5 & 2 Shift	
Job Classifications	No. per Shift	Total	No. per Shift	Total
Head Operator	1	4	1	3
Reactor Cooler Operator	1	4	2	6
Drummer Filter Operator	1	4	1	3
Latex Tester	1	4	1	3
Handyman		2		3
Utilityman		1		1
		19		19

Concerning the changes reflected above, the only employee who would suffer a reduction in his hourly rate would be the least senior head operator whose position would be eliminated and who would be transferred to a reactor cooler operator position at a rate of 18 cents per hour less than his eliminated position.[3] Further, because of the reduction in hours

business considerations. Thus, at the time of the decision the Company advised the Union that the reason for the change was to save on utility costs. Gay testified that the saving in electricity (which is used to produce steam) would approximate $800 to $1,000 per month. In addition, Gay testified that the Company had lost one of its large customers and that its sales of latex had dropped off 8 to 9 percent from the preceding year.

[3] According to the unrefuted testimony of Gay, the employee to be so affected would be Stanley Angeloszek, whose

worked and the elimination of overtime, weekend and holiday premiums, Gay estimated that the other employees would earn approximately $570 less per year than they would on the 7 and 2 schedule. However, and as will be further discussed below, none of these changes actually were effectuated because of the strike which commenced just prior to the opening shift on the morning of June 7, 1971, at which point the 5 to 2 schedule was to have been put into effect.

The first word to the employees concerning the above-noted schedule change took place in early May 1971 at which time Superintendent Gay discussed it with the four head operators. This came to the attention of the Union steward in the department, Ronald Caron, and thereafter Caron attended a series of meetings held between Gay and all the latex department employees. In these meetings various mechanics of the proposed change were discussed.

On May 21, William Sawickey, President of the Local Union, received a copy of a notice addressed to the "Latex Plant Personnel," dated May 20, 1971, and signed by Superintendent Gay, and announced that effective on Monday, May 31, the latex department would commence operating on a 5 and 2 shift schedule.[4] On the afternoon of May 21, Sawickey had a meeting with Gay and several other Company officials. Sawickey testified without contradiction that when he took the position that the matter was subject to negotiations, Personnel Manager James John-

rate of pay as head operator at $3.82 would have dropped to $3.64 as reactor cooler operator.

[4] Although the notice was dated May 20, the record is not clear as to whether it was posted on May 20 or May 21.

son replied, "that he would be willing to discuss it, but as far as negotiating, no." Sawickey thereupon invoked the grievance procedure,[5] and the Step 1 and 2 formalities were completed, with Respondent denying the grievance. After the meeting Sawickey called Francis McDermott, the Union's International Representative who serviced the area, and apprized him of the situation. McDermott promptly sent a telegram to Respondent stating that "any change made in the shift schedules, as threatened, will be considered a violation of the agreement."

A meeting was held on Saturday, May 22, under Step 3 of the grievance procedure. In addition to the Local Union officials, McDermott was also present at this meeting and the record is clear that from this point forward he acted as the principal spokesman and negotiator for the Union. McDermott voiced various objections to the schedule change, including the effects it would have upon the employees, and charged that the announced change would be a breach of the contract. With no agreement being reached, the parties met again in a continuation of the Step 3 meeting on the following Saturady, May 29. As a result of this meeting, and while no basic agreement was reached, the Respondent postponed the previously announced effective date of the change (May 31) to Monday, June 7. The parties also agreed to meet again on June 3 for the purpose of holding a Step 4 grievance meeting. On June 1 the Company submitted a written denial of the Step 3 grievance. It is noteworthy that the following statement contained

[5] Sawickey testified, "So at that time I found it fruitless to discuss the matter any longer, so I started the grievance procedure."

in this document expresses, in essence, the position which Respondent had taken all along with respect to the matter:

> This change in shift schedule is for economical reasons and the Company Committee does not agree that going from a 7-2 shift schedule to a 5-2 shift schedule must be negotiated but certainly are willing to discuss the mechanics of getting there.

The June 3 meeting, with all the parties present, was attended for the first time by Frank Bartolomeo, the plant manager, who acted as principal Company spokesman. A lengthy and argumentive discussion ensued, but no agreement was reached. The meeting ended with Bartolomeo stating that he would give the Union his answer on the following day. This he did by telephoning McDermott the next morning to advise him that, for reasons stated, Respondent would adhere to its plan for changing the schedule on June 7.[6]

Somewhat later on June 7 McDermott was approaching the plant in his car to see about another matter when he was hailed by Plant Industrial Relations Manager James Johnson. Johnson advised that Frank Neering, Industrial Relations Manager of Respondent's Midland Division, wished to speak to him. McDermott thereupon accompanied Johnson to the office and a short while later there ensued a three-way telephone conversation between McDermott Johnson and Neering, the latter having been called in Michi-

[6] Thereafter, on about June 17, Bartolomeo submitted a written answer to the Union which set forth in detail Respondent's reasons for denying the grievance.

gan. The upshot of this conversation was that although McDermott again protested the forthcoming schedule change in the latex department, Neering let it be known that he would uphold the decision of the local (Allyn's Point) management and that he would not interfere with the scheduled implementation of the change.

B. *The Strike of June 7, 1971 and Ensuing Events*

International Representative McDermott met with local Union President Sawickey late in the evening of June 6, 1971. Sawickey testified that at this time McDermott informed him they would meet with the employees at about 8 a.m. the following morning, a Monday. Arriving at the plant at about 7 a.m. on June 6, Sawickey advised the men who were reporting to work that a special meeting, called by McDermott, would be held just outside the plant. At about the same time the men at work in the plant on the late shift were notified of this meeting by a union steward, whom Sawickey had called earlier. Leaving the plant, these men joined the others and a meeting, with approximately 100 employees in attendance, was conducted by McDermott starting at about 8 a.m. McDermott related what had taken place at the grievance meetings with the Company representatives. A short while later Johnson came out to address the employees and give the Company's point of view. McDermott testified that after Johnson departed "the whole thing erupted," with the employees shouting that they were not going to work. He finally turned to Sawickey, he said, and stated, "Okay, Bill, that's the way the men are. We'll go down and notify the

Company that the men don't want to go to work." The men did not return to work that day.[7] The following day, June 8, the employees picketed with signs bearing the legend "Dow unfair to its union employees, members of Local 13744 on unfair labor strike." The picketing, with never any change of the legend on the signs, continued until about April 1972.

As to be expected, in the first days of the strike Respondent, by written and oral communications with various International and Local Union representatives, protested that the strike was in violation of the contract. In response to a telephone call from Industrial Relations Director Neering, Marlin Brennan, a vice president of the International, sent a letter to Neering dated June 7, 1971, advising that he had contacted Union Regional Director Earl Colandro and the President of the Local Union and "instructed them to order the membership back to work and process the grievance through the grievance procedure provided in the existing contract between Dow

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[7] Without any personal reflection intended, McDermott clearly demonstrated on the witness stand by his entire demeanor as well as by his lengthy and emotionally charged responses to many of the questions put to him, that he is by nature a fiery, aggressive, determined and explosive-type individual. I am constrained to give little weight to his assertion that he advised the assembled employees not so strike but to return to work. This case does not involve a spontaneous walkout or work stoppage. It was McDermott's decision to assemble the men in the first instance and I find it hard to believe, any lip service notwithstanding, that McDermott did not have enough influence among the men to have them do his bidding.

Chemical Company and District 50." [8] The record is clear, however, that the International Union in fact did not at any time during the strike direct or urge the men to return to work.

On June 11, Bartolomeo met with Union Vice-President Colandro at the Connecticut Yankee Motor Inn. Although nothing was resolved at this meeting, the Charging Party introduced a deposition of Colandro, who is now deceased, the significant part of which appropriately warrants comment here and in which he stated as follows:

> We talked about the issue at hand, but the remarks that Mr. Bartolomeo made at that time were that he was more interested in getting rid of International Representatives of the union and Local union than he was in settling the dispute. Our meeting at the Connecticut Motor Inn served about as much purpose—actually served no purpose at all to this situation. We tried to resolve it. We told him we would go even into arbitration with the thing but he refused on every angle and every approach that we made on it.

Plant Manager Bartolomeo, called on rebuttal, denied making any remark to the effect that he was more interested in getting rid of union officials than he was in settling the strike. Bartolomeo impressed

[8] Brennan testified that he was unable to contact Colandro after talking to Brennan, and that hence he sent the "routine" letter discussed above. Testifying also that at the time he was unfamiliar with the particular contract with Respondent's Allyn's Point Plant, he said that about 2 days later he spoke to Colandro who told him "we have the right to strike under the provisions of that contract."

me as an honest and forthright witness and I credit his testimony that he did not make any statement such as that attributed to him by Colandro in the above deposition. Moreover, I hardly think that Bartolomeo, with his experience and apparent intelligence, would have been so naive or foolish as to make any such union-baiting remark to a vice president of the International Union. Indeed, it is noteworthy that aside from Colandro's foregoing testimony, which I do not credit, there is no evidence in the entire record of any union animus on behalf of the Respondent.

Returning to the chronology of facts, on June 11 Bartolomeo also sent a letter to the employees and the Union committee, in which he stated, *inter alia*, that "illegal acts of violence and continued participation in the strike could subject you to legal remedies, disciplinary action and even discharge." Asking the employees to discontinue the "unlawful strike" the letter further stated:

> I sincerely feel that the resolution to the problem lies in the grievance and arbitration procedure and ask you to encourage your Union leadership to return to the legal and in my opinion right means of solving this problem.

Letters of similar content were sent to the employees by Bartolomeo on June 17 and July 13. By letter of July 23, Bartolomeo notified the employees that Respondent would commence hiring replacements on July 29, stating also that requests for reinstatement would be considered "as long as job opportunities remain," but that employees might be "delayed or prevented," from returning to work because

of their "participation in unlawful activities pertaining to the strike."

In the meantime, on June 10, Union and Company representatives held an unsuccessful meeting with State mediation officials, in an attempt to resolve the dispute. On July 26 Respondent sent a letter to the Labor Commissioner of Connecticut advising him of its willingness "to submit the labor dispute resulting in said strike or walkout to arbitration or mediation." A further meeting was held with a State mediation official, who met with the parties separately, in about the first week of August. However, this meeting also was of no avail.

C. *The Cancellation of the Contract; The Termination of Employees; Withdrawal of Recognition*

It is undisputed that Respondent rescinded the collective-bargaining agreement by letter, dated August 9, 1971. This letter which was signed by Bartolomeo and sent to Local and International Union officials, stated as follows:

> This is to notify you that because of the breach of the Collective Bargaining Agreement between the Allyn's Point Plant of the Dow Chemical Company and the Union which had as its effective date 2/23/70, we hereby cancel the Agreement.

On August 12, Bartolomeo sent a letter to the striking employees which stated as follows:

> We are currently in the tenth week of the strike which commenced on June 7, 1971. As you know I have predominately relied on these letters to keep you informed of what I consider the true facts regarding the strike, its issues and its consequences.
>
> It has been a month since I discussed with you my need to evaluate the long-term operation of the Allyn's Point Plant. In the meantime some employees have been returned to work and we have hired a number of new permanent employees. I must continue to take further positive action in restoring the plant to standard operating conditions by assuring the availability of employees willing to work.
>
> Tuesday, August 17, 1971, at 4:00 p.m. will be the last day that request for reinstatement will be accepted. Requests for reinstatement should be made by personally coming to the Personnel Office of the plant and then, if accepted, report in ready to work when scheduled. Your request will be individually considered.
>
> In considering your decision you should be aware that disciplinary action is being taken as to all employees involved in this illegal strike. This action could be written reprimands, suspension or refusal to reinstate.

Respondent terminated the striking employees at 4 p.m. on August 17. Bartolomeo's letter of August 18 to the striking employees notifying them of this action stated in pertinent part as follows:

> During the past ten weeks I have furnished you information about your status as a striker involved in the illegal and unprotected strike at the Allyn's Point Plant.
>
> By letters of June 11th and 17th, July 13th and 23rd, and August 12, 1971, I explained the Com-

pany's position concerning the strike and suggested that you consider requesting reinstatement. The August 13th letter stated that your request for reinstatement had to be received by the Company no later than 4:00 p.m. on August 17, 1971 to be considered.

You failed to respond and did not request reinstatement by that time and date. By your involvement in the illegal and unprotected strike you forfeited any rights as an employee. The Company has accordingly terminated your employment. As of 4:00 p.m., August 17, 1971 your name was removed from the employee personnel list and you are no longer an employee of the Dow Chemical Company.

On or about August 26, Bartolomeo received a petition signed by 55 hourly employees which in pertinent part stated, "We do not want or need the International Union of District 50, Local #13744 at our plant." It is undisputed that the 55 employees who signed this petition constituted a substantial majority of the employees who were working for the Respondent at this time. There is no evidence, nor is there any contention, that Respondent in any way sponsored, encouraged or gave assistance in the circulation of this petition.

On August 28, Bartolomeo sent a letter to the Local President and International Representative stating that the Company had "reason to believe "that the Union no longer represented a majority of the employees and advising that "because of the lack of majority status and contract termination . . . the Company no longer recognizes the Union as bargaining agent for our hourly rated employees at the

Allyn's Point Plant." Respondent has not recognized the Union since this communication.

D. *Additional Facts; Conclusions*

1. The Variance in Contentions Between the General Counsel and the Charging Party

In discussing my conclusions in this case, I should first note that in large part the General Counsel has proceeded on a substantially different theory than that urged by the Charging Party. To put it briefly, both parties urge, as the complaint alleges, that on or about May 20, 1971, Respondent unilaterally announced the change in the operating schedule, as previously discussed herein, and that thereafter it refused to bargain over the matter, all in violation of Section 8(a)(1) and (5) of the Act. Here the positions change. Apart from a factual issue as to whether the Union complied with the grievance procedure of the contract before going out on strike, the Union, relying upon the principle set forth in *Mastro Plastic Corp.* v. *N.L.R.B.*, 350 U.S. 270, contends that the strike was caused by the Respondent's unfair labor practices and that hence, without anything further, Respondent's termination of the striking employees, its cancellation of the contract and its withdrawal of recognition was in violation of Section 8(a)(1), (3) and (5) of the Act. The General Counsel, on the other hand, does not contend that the strike was an unfair labor practice strike *ab initio*. Thus, at the hearing, and more specifically in his brief, the General Counsel stated his position as follows: "General Counsel takes the position that the unilateralism engaged in by Respondent, even

though an unfair labor practice, was not so serious so as to label the strike at its inception on June 7 a protected strike if, as alleged by Respondent, said employees went out on strike in violation of the contract's no-strike clause." Parenthetically, it may be noted that although the latter part of the General Counsel's statement reflects an obviously hedged position, it is interesting that the General Counsel does not in fact urge that Respondent's defense, to which he alludes, is lacking in merit. However, proceeding on a different theory, the General Counsel does contend that the strike beginning on June 7, 1971, was subsequently converted into an unfair labor practice strike, particularly by reason of Respondent's cancellation of the contract, hence that the termination of the striking employees, its rescission of the contract and its withdrawal of recognition were all in violation of Section 8(a)(1), (3) and (5) of the Act.

2. Unilateral Action in Changing the Work Schedule in the Latex Department

Admitting that it would not negotiate with the Union concerning its decision to change the shift schedule in the latex department from a 7-2 workweek to a 5-2 workweek, Respondent contends that it had a right to do so under the terms of the then effective collective-bargaining agreement. Thus, Respondent relies on two of the contract provisions, the first of these being the management rights clause (Article II, Section 2.1) which in pertinent part provides that the Company shall have the right "to hire, promote, or demote . . . employees for due cause or lack of work or for other legitimate reasons . . ." and

that "other rights and responsibilities belonging soley to the Company [include] . . . schedules of production and processes of manufacturing . . . ."

Respondent also points to Article IV, Section 4.1, entitled "Hours of Work," the pertinent provisions of which are as follows:

> (g) A 7 and 2 shift employee will follow the standard shift (1, 2, 3, 4) work schedule. An individual's shift schedule and scheduled days off may be changed as a result of: posting; bumping; balancing the experience and training of personnel; personnel problems; loanout; training period; temporary job; waiver—if requested and approved.
>
> (h) A 5 and 2 shift schedule using three employees in rotation has been established for 24 hours per day, five days a week for work coverage where one or more men per shift is required in a classification.
>
> (i) The provisions of this section may be modified only by mutual agreement of the Company and Union Committees.

I am persuaded that none of the above contract provisions, either explicitly or implicitly, authorizes the Respondent to unilaterally change the work schedule of the employees from a 7-2 workweek to a 5-2 workweek in the manner and to the extent contemplated by the change which was to become effective on June 7, 1971.[9] Thus, I think it clear that the right

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[9] I reject Respondent's contention that no unfair labor practice involving unilateral action can be found because the announced change was never implemented. Insofar as the issues in this case are concerned, the change in the work schedule was to all practical effect accomplished.

to "schedule production" does not authorize the unilateral changing of hours or days of work. In fact, the hours of work are specifically governed by Article IV of the contract, the last clause of which provides that any changes in that section may be modified only by mutual agreement of the parties. Further, it is noteworthy that although Section (g) of Article 14 specifies that the schedule of an individual 7 and 2 shift employee may be changed under certain conditions, it appears clear that Respondent's announced change was not predicated upon any of the specific conditions set forth therein. Accordingly, and because I find that Respondent's unilateral decision to change from a 5-2 work schedule from a 7-2 work schedule was not sanctioned by the contract,[10] I find and conclude that Respondent's unilateral announcement and scheduling of this change violated Section 8(a)(5) and (1) of the Act.[11] See *Long Lake Lumber*

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[10] The waiver by a union of its statutory right to be consulted concerning wages, hours, and terms and conditions of employment must be clear and unmistakble. *The Timken Roller Bearing Co.* v. *N.L.R.B.*, 325 F. 2d 746 (C.A. 6), cert. denied 376 U.S. 971.

Moreover, and having considered all the evidence pertaining to the history of bargaining, I am satisfied that the evidence does not establish that the Union intended to grant Respondent the right to unilaterally change the 7-2 work schedule in the latex department.

[11] Cf. *Jos. Shlitz Brewing Company*, 715 NLRB 141, wherein the Board refused to exercise jurisdiction on the ground that the case should be left for arbitration under the contract's grievance and arbitration procedure, since the arbitral interpretation would resolve both the unfair labor practice issue and the contract interpretation issue in a manner compatible with the purposes of the Act. While it is arguable

Company, 160 NLRB 1475; *Smith Cabinet Manufacturing Company, Inc.*, 147 NLRB 1506.

In addition, the complaint alleges that Respondent's announcement of the work schedule change in the latex department, as discussed above, constituted a modification of the contract terms without complying with the requirements of Section 8(d) of the Act. However, the Board has held that "the breadth of Section 8(d) is not such as to make any default in a contract obligation an unfair labor practice, for that section, to the extent relevant here, is in terms confined to the 'modification' or 'termination' of a contract." *C & S Industries, Inc.*, 158 NLRB 454. Indeed, although I have held that the contract did not *authorize* the Respondent unilaterally to take the action in question, it does not necessarily follow that this conduct also constituted a breach or substantial modification of the contract.[12] In any event, and upon the entire record in this case, I am persuaded that Respondent's unilateral action here was not of such scope as to constitute a "modification" of the contract within the meaning of Section 8(d). Accordingly, it is recommended that this allegation be dismissed.

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here that Respondent here also acted under color of a right, Respondent does not urge that the Board should defer the matter to arbitration. Accordingly, under *MacDonald Engineering Co.*, 202 NLRB No. 113, I must conclude that the record evidence before me is insufficient for a finding that deferral is warranted. See also *Medco Construction Corp.*, 206 NLRB No. 17.

[12] Thus, it might well be argued that contract is either silent or ambiguous with respect to the particular subject here at issue.

3. *The Union's Contentions*

The Union first of all contends that the strike action taken on June 7, 1971, did not breach the collective-bargaining agreement and therefore was a protected strike from the outset. I find this contention to be without merit.

Article VII, Section 7.7 of the then effective contract contains a no-strike no-lockout provision which in pertinent part provides that the Union may not engage in a strike unless and until "all of the Bargaining and Grievance Procedure outlined in this agreement [Steps 1 through 5] have been exhausted," the Union or the Company has made a written request for arbitration after receipt of the Step 5 answer, *and* arbitration has either been completed or refused.

It is undisputed that the parties completed and complied with the first four steps of the grievance procedure.[13] Step 5 thereof provides as follows:

> Step 5. Should a satisfactory solution not be arrived at in Step 4, the Union chairman of the grievance committee shall so notify the Plant Manager, or appointee, in writing and within ten days the Company shall arrange for the unresolved case to be reviewed by the Midland Division Manager in charge of the Allyn's Point Plant of his appointees.

The Union contends in its brief that "the telephone conversation initiated by Neering on June 4 satisfied

[13] It will be recalled that the Step 4 meeting was held on June 4, that Bartolomeo orally notified McDermott of Respondent's decision on June 5, and that a written answer was provided to the Union on June 17.

all the essential requirements of a Step 5 meeting . . . ." In rejecting this contention as without merit, the short answer to this is that the unequivocal requirements set forth in the above-quoted provision were obviously not complied with. Thus, not only is it undisputed that there was no written request to proceed with Step 5, but Respondent submitted uncontested evidence showing that it had been the practice of the parties to always adhere to this requirement.[14] Nor can I accept the Union's contention that the requirement of a written request was waived because Neering initiated the telephone conversation with McDermott on June 4. I find nothing in this act or the discussion which followed to warrant the conclusion that that Respondent either directly or inferentially gave any indication of waiving this requirement. Indeed, Neering credibly testified that during this telephone conversation he advised McDermott, *inter alia*, "not to do anything foolish, follow the grievance procedure." Finally, and with further respect to Respondent's contention, it is undisputed that there was no review of the grievance by the Midland Division Manager in charge of the Allyn's Point Plant, or his appointee, as provided in the Step 5 provision. Thus, not only is there no evidence to establish that Harold Bosscher, then the Midland manager, ever appointed or authorized Neering to act in his behalf in the matter, but the record

[14] Except in four instances where records were unavailable, the records reflect that there was a written request to proceed to Step 5 in every grievance processed to this step under the 1966 and 1970 collective-bargaining agreements. During this period there were a total of 36 such written requests to proceed to Step 5.

establishes, as the Union undoubtedly knew, that W. Fletcher had acted as Bosscher's appointee (also known as the appealsman) in the preceding 18 consecutive grievances that were brought through Step 5.[15]

I also reject, as unsupported by the evidence, the Union's further contention that arbitration was requested by the Union and refused by the Respondent. In the first place, this contention may be put to rest merely by noting that the contract does not even contemplate arbitration until such time as the Fifth Step of the grievance procedure has been utilized and completed, which I have found it was not. However, assuming *arguendo* that there was compliance with Step 5, it is undisputed that at no time was there fulfillment of the remaining contractual prerequisites to the right to strike, namely, a request "in writing, within 30 days to proceed to arbitration" and a refusal by the Company to agree to arbitration.[16]

Finally, the Union contends that the June 7 strike was protected under the doctrine of the *Mastro Plas-*

[15] Joint Exhibit F.

[16] A transcript of the Step 4 grievance meeting on June 3 reflects that during this lengthy meeting McDermott at one point did make spontaneous reference to the possibility of taking the matter to arbitration. McDermott also testified, but Neering denied, that he (McDermott) [illegible] proposed arbitration during his telephone conversation with Neering on June 4. Whatever McDermott may have orally and spontaneously proposed during either discussion, I think it clear that any such reference to arbitration related solely to *immediate* arbitration, and in any event, could not possibly be construed as complying with the specific requirements of the contract's grievance and arbitration procedure.

tics case, *supra.* In *Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802, and for reasons fully explicated therein, the Board rejected a rigid interpretation of *Mastro Plastics* and adopted the rule that "only strikes in protest against serious unfair labor practices should be held immune from general no-strike clauses." See also *Atlantic Richfield Company*, 199 NLRB No. 135 for a further application of this rule.

Upon the facts in this case, I find and conclude that Respondent's unilateral conduct, although found to be an unfair labor practice, was not of such serious nature as to be "destructive of the foundation of which collective bargaining must rest." [17] Indeed, as heretofore indicated, there is no evidence that Respondent held any union animous, the parties appear to have long enjoyed a harmonious relationship, and there is no evidence to indicate that Respondent wished "to rid itself of the Union." Moreover, here, as in *Arlan's Department Store* and *Atlantic Richfield, supra,* the contract grievance procedure was available for the peaceful resolution of the dispute. The Union having failed to submit the dispute in accordance with these provisions of the contract, I can but conclude and find that the strike beginning on June 7, 1971, was unprotected from its inception.

4. The Alleged Unlawful Rescission of the Contract

The General Counsel contends, and the complaint alleges, that Respondent's cancellation of the contract on August 9, 1971, was violative of Section 8(a)(5)

[17] *Mastro Plastic Corp., supra.*

and (1) of the Act. Respondent defends on the ground that this action was justified because the Union breached the contract by engaging in a strike which was proscribed by the no-strike clause. In support of its position, Respondent largely relies on *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 involving a situation where, as here, the Union engaged in a strike contrary to the provisions of a no-strike clause contained in the contract. In finding that the employer's subsequent cancellation of the collective-bargaining agreement was not an unfair labor practice, the Board stated, "We find that the Respondent's unilateral cancellation of its contract with UE did not constitute a violation of Section 8(a)(5) and (1) of the Act, but was justified by UE's prior breach of the contract." [18]

The General Counsel, on the other hand, relies principally on certain dicta by the Court in *N.L.R.B.* v. *State Electric Service, Inc.*, —— F. 2d —— (C.A.

[18] In enforcing the *Marathon* case, *supra*, the Court in *United Electrical Workers* v. *N.L.R.B.*, 223 F. 2d 338, 341 (C.A.D.C.), cert. denied 350 U.S. 981, stated:

> It is general law that one party to a contract need not perform if the other party refuses in a material respect to do so. And that rule applies to labor contracts. Moreover, in cases where the breach is a strike in violation of a collective bargaining agreement, as in the instant case, application of the rule is supported by the rationale underlying such agreements. The prevention of strikes is one of the principal purposes of labor contracts and of the Act. A no-strike provision is 'the chief advantage which an employer can reasonably expect from a collective labor agreement.' The walkout was a material breach which justified the subsequent rescission of the contract by the company.

5), 82 LRRM 3154 [19] wherein the Court stated that a union's breach of a no strike clause in not "automatically" sufficient to breach the entire contract.

I find the General Counsel's reliance upon *State Electric* to be misplaced because the facts in that case differ significantly from those in *Marathon Electric* as well as from those in the case at bar. Thus, when the Board decided that the employer's cancellation of the contract in *State Electric* was not justified, it based this finding upon the factual grounds that (1) the no-strike clause in question was a limited one and the union's work stoppage was not in violation of it; and (2) "the strike occurred as a result of the [employer's] failure to respond to the Union's request for recourse to the contractual procedure," and that even thereafter "the Union continued to abide by the contract by submitting the charge of the Company's failure to abide by the contract to the dispute settlement procedure of the contract . . . ." Neither of these circumstances are present in *Marathon Electric* or in the instant case. Indeed, as has been previously found, this is a case where the Union, not the Respondent, failed to comply with the grievance procedure. Furthermore, insofar as *State Electric* is concerned, the Board in that decision gave no indication whatsoever that it intended to repudiate or modify the rule in *Marathon Electric*, *supra;* it appears simply to have declined application of that rule in the absence of a clear breach of contract by the Union.

For the reasons stated above, I believe the rule expressed by the Board in *Marathon Electric*, *supra*,

[19] Enforcing *State Electric Service, Inc.*, 198 NLRB No. 77.

which it recently affirmed in *Kellstone, Inc.*, 206 NLRB No. 27, to be applicable and controlling to the issue presented here.[20] Accordingly, I find that Respondent, by reason of the Union's breach of the no-strike provision in the contract, did not violate Section 8(a)(5) and (1) when it rescinded the contract.[21] Accordingly, it is recommended that this allegation of the complaint be dismissed.

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[20] I find the additional cases cited by the General Counsel and the Charging Party, all of which I have considered, to be factually distinguishable and not decisive of the issue here.

[21] Pointing out that Respondent's letter to the Union of August 9, 1971, cited only "breach of the collective bargaining agreement" as its reason for cancelling the contract, the General Counsel and the Charging Party urge that no weight should be given to certain additional reasons, advanced and testified to by Plant Manager Bartolomeo, for taking this action. The additional reasons thus given by Bartolomeo include the following: (1) complaints he received from job applicants to the effect that they had been stopped, harassed and threatened when coming through the picket line for job interviews; (2) complaints from replacements hired after the strike that they were threatened with fines because they had violated union rules, that they would have to join the Union because of the union shop clause in the contract, as well as complaints from some of the employees who returned to work that charges had been filed against them threatening them with fines, and (3) the fact that the Company regarded its legal position to be buttressed by the Regional Director's dismissal, on August 6, 1971, of a refusal to bargain unfair labor practice charge which had been earlier filed by the Union.

While the record does not permit a ruling on the merits of each of the aforesaid factual assertions by Bartolomeo, I have no doubt but these were matters which Bartolomeo in fact did take into consideration in finally reaching a decision to cancel the contract. However, since it is plain that Respondent's basic reason for taking this action was the Union's breach of contract. I think it clear that the additional reasons go more toward explaining the particular *timing* of this action. It seems to me that if an employer is justified in cancelling the contract in the first instance, surely it does not waive this right by deferring this action until such time as it has additional grounds therefor.

5. The Termination of the Strikers Withdrawal of Recognition

Proceeding on the theory that the strike was converted into an unfair labor practice strike by Respondent's rescission of the contract on August 9, 1971, the General Counsel alleges that the striking employees thereby became unfair labor practice strikers and that hence their termination by Respondent on August 18, 1971, was violative of Section 8(a)(3) and (1) of the Act. However, having found adversely to the General Counsel on the matter of the cancellation of the contract, it follows, and I find, that the strike was not thereby converted into an unfair labor practice strike. I also am unpersuaded by the General Counsel's further academic argument, as stated in his brief, that ". . . Respondent cannot have his cake and eat it, too. After cancelling the contract, Respondent cannot thereafter justify the discharge of striking employees by its reliance on the cancelled contract." The short answer to this is that whatever were Respondent's rights to discharge the strikers, these did not derive from the contract, but rather involve the question as to whether or not the action taken, under all of the circumstances of this case, was prohibited or permissive under the Act.

In sum, I must conclude, as the Board put it in

The Kroger Co. (Cleveland Div.)[22] that ". . . the striking employees forfeited any rights they may have had to reinstatement by participating in the strike in violation of the no-strike provision of the . . . contract then in effect." Accordingly, it is found that Respondent did not violate Section 8(a)(3) and (1) of the Act by its termination of the striking employees.[23]

I also find that Respondent did not, as the complaint alleges, violate Section 8(a)(5) of the Act by withdrawing its recognition of the Union on August 28, 1971. This conclusion must follow in consequence of the aforenoted finding that Respondent validly terminated the strikers on August 18.[24] The strikers no longer enjoying the status of employees, Respondent was entitled to rely on the heretofore described petition on about August 26, 1971, signed by a majority of the employees then employed by Respondent that they did not wish the Union to represent them.

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[22] 177 NLRB 769.

[23] See also *United Furniture Workers of America, AFL-CIO, Local 270* v. *N.L.R.B.*, 336 F. 2d 738 (C.A.D.C.), cert. denied, 379 U.S. 838; *N.L.R.B.* v. *Kaiser Aluminum & Chemical Corp.*, 217 F. 2d 366, 369 (C.A. 9).

Furthermore, assuming *arguendo* that Respondent's rescission of the contract was an unfair labor practice, the General Counsel has not established that the cancellation of the contract in fact led to a prolongation of the strike. Thus, it is undisputed that there was never any change in the language on the pickets signs, in addition to which there is no evidence whatsoever to indicate any overt manifestation by the Union of any change in the initial objective of the strike after the rescission of the contract.

[24] *Marathon Electric Mfg. Corp. supra; United Furniture Works of America, Local 270* v. *N.L.R.B., supra.*

Finally, the complaint alleges that Respondent violated Section 8(a)(1) of the Act in that its letter to the striking employees of August 12, 1971, which has been previously set forth in full herein, unlawfully "threatened to permanently replace them if they did not abandon the strike" and unlawfully "threatened them with disciplinary action when they abandoned the strike and returned to work." I find this allegation to be without merit. Suffice it to say that inasmuch as the employees were engaged in an unprotected strike, it seems clear that Respondent was within its rights in advising them which of its legal perogatives it might exercise against them if they continued in this activity. I shall, accordingly, recommend that this allegation also be dismissed.[25]

The Remedy

I have heretofore concluded and found that Respondent engaged in unlawful conduct by unilaterally determining and announcing a change in the work schedule of employees in the latex department. While normally I would recommend an order requiring Respondent to cease and desist from this conduct, to

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[25] I also reject as without merit the Union's contention that Respondent "condoned any strike behavior by offering the [strikers] reinstatement after August 9." Suffice it to note that in its letters from June 11 through August 12, 1971, even though directly or indirectly appealing to the employees to abandon the strike and return to work, Respondent consistently indicated that it reserved the right to take whatever action against them it deemed necessary or appropriate. Clearly, Respondent did not thereby demonstrate a "willingness to forgive the improper aspects of concerted activity, to wipe the slate clean." *Confectionary and Tobacco Drivers, Local 805* v. *N.L.R.B.* 312 F. 2d 108, 112-113 (C.A. 2).

take certain affirmative action, and to post appropriate notices, I am persuaded that under the peculiar circumstances of this case no such order is warranted or necessary. My reasons for this are threefold, namely (1) Since the employees in the appropriate unit are no longer represented by the Union or by any other labor organization, it obviously is no longer possible to order Respondent to bargain affirmatively with any bargaining representative of the employees; (2) Inasmuch as Respondent did not in fact implement the announced change in the work schedule, there is no *stauts quo ante* to be restored; and (3) Without relying on this reason alone, I think some consideration should be given to the fact that Respondent was agreeable to, and in fact did, consult with the Union concerning the mechanics of putting the 5-2 work schedule into effect, in addition to which it partially complied with the Union's request that the matter be deferred by postponing the effective date of the announced change for 1 week. Clearly, this would seem a far cry from any "complete rejection of the bargaining principle."

ORDER [26]

The complaint is dismissed in its entirety.

Dated at Washington, D. C.

/s/ John P. von Rohr
JOHN P. VON ROHR
Administrative Law Judge

[26] In the event no exceptions are filed as provided in Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

APPENDIX E

RELEVANT PORTIONS OF STATUTES INVOLVED

National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151, *et seq.*):

UNFAIR LABOR PRACTICES

Sec. 8. (a) It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * *

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: *Provided*, That nothing in this Act, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in section 8(a) of this Act as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 9(a), in the appropriate collective-bargaining unit covered by such agreement when made, and (ii) unless following an election held as

provided in section 9(e) within one year preceding the effective date of such agreement, the Board shall have certified that at least a majority of the employees eligible to vote in such election have voted to rescind the authority of such labor organization to make such an agreement: *Provided further*, That no employer shall justify any discrimination against an employee for nonmembership in a labor organization (A) if he has reasonable grounds for believing that such membership was not available to the employee on the same terms and conditions generally applicable to other members, or (B) if he has reasonable grounds for believing that membership was denied or terminated for reasons other than the failure of the employee to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership;

* * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a).

* * *

(d) For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either

party to agree to a proposal or require the making of a concession: *Provided*, That where there is in effect a collective-bargaining contract covering employees in an industry affecting commerce, the duty to bargain collectively shall also mean that no party to such contract shall terminate or modify such contract, unless the party desiring such termination or modification—

(1) serves a written notice upon the other party to the contract of the proposed termination or modification sixty days prior to the expiration date thereof, or in the event such contract contains no expiration date, sixty days prior to the time it is proposed to make such termination or modification;

(2) offers to meet and confer with the other party for the purpose of negotiating a new contract or a contract containing the proposed modifications;

(3) notifies the Federal Mediation and Conciliation Service within thirty days after such notice of the existence of a dispute, and simultaneously therewith notifies any State or Territorial agency established to mediate and conciliate disputes within the State or Territory where the dispute occurred, provided no agreement has been reached by that time; and

(4) continues in full force and effect, without resorting to strike or lockout, all the terms and conditions of the existing contract for a period of sixty days after such notice is given or until the expiration date of such contract, whichever occurs later:

The duties imposed upon employers, employees, and labor organizations by paragraphs (2), (3), and (4) shall become inapplicable upon an intervening certification of the Board, under which the labor organization or individual, which is a party to the contract, has been superseded as or ceased to be the representative of the employees subject to the provisions of section 9(a), and the duties so imposed shall not be construed as requiring either party to discuss or agree to any modification of the terms and conditions contained in a contract for a fixed period, if such modification is to become effective before such terms and conditions can be reopened under the provisions of the contract. Any employee who engages in a strike within any notice * period specified in this subsection, or who engages in any strike within the appropriate period specified in subsection (g) of this section,* shall lose his status as an employee of the employer engaged in the particular labor dispute, for the purposes of sections 8, 9, and 10 of this Act, as amended, but such loss of status for such employee shall terminate if and when he is reemployed by such employer. Whenever the collective bargaining involves employees of a health care institution, the provisions of this section 8(d) shall be modified as follows:

(A) The notice of section 8(d)(1) shall be ninety days; the notice of section 8(d)(3) shall be sixty days; and the contract period of section 8(d)(4) shall be ninety days.

(B) Where the bargaining is for an initial agreement following certification or recognition, at least thirty days' notice of the existence of a dispute shall be given by

the labor organization to the agencies set forth in section 8(d)(3).

(C) After notice is given to the Federal Mediation and Conciliation Service under either clause (A) or (B) of this sentence, the Service shall promptly communicate with the parties and use its best efforts, by mediation and conciliation, to bring them to agreement. The parties shall participate fully and promptly in such meetings as may be undertaken by the Service for the purpose of aiding in a settlement of the dispute.*

Labor Management Relations Act, 1947, as amended, 29 U.S.C. § 151 *et seq.* (1964):

TITLE III

Suits by and Against Labor Organizations

Sec. 301. (a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

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* Pursuant to Public Law 93-360, 93d Cong., S. 3203, 88 Stat. 396, the last sentence of Sec. 8(d) is amended by striking the words "the sixty-day" and inserting the words "any notice" and by inserting before the words "shall lose" the phrase, "or who engages in any strike within the appropriate period specified in subsection (g) of this section." In addition, the end of paragraph Sec. 8(d) is amended by adding a new sentence "Whenever the collective bargaining . . . aiding in a settlement of the dispute."

(b) Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal offices, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) The service of summons, subpena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) For the purpose of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

Supreme Court, U. S.
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AUG 30 1976
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IN THE

Supreme Court of the United States

October Term, 1975

No. 75-1895

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

UNITED STEELWORKERS OF AMERICA,
AFL-CIO-CLC,
AND
NATIONAL LABOR RELATIONS BOARD,
Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Third Circuit

BRIEF OF RESPONDENT UNITED STEELWORKERS OF AMERICA IN OPPOSITION

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BRIEF OF RESPONDENT UNITED STEELWORKERS OF AMERICA IN OPPOSITION

COUNTER-STATEMENT OF THE QUESTION PRESENTED

Whether the Court of Appeals properly remanded to the National Labor Relations Board for reconsideration the questions whether, in the circumstances of this case, the Com-

pany committed unfair labor practices by (1) discharging employees striking to protest the Company's unlawful refusal to bargain and (2) unilaterally cancelling the entire collective bargaining agreement.

COUNTER-STATEMENT OF CASE

Petitioner, The Dow Chemical Company, in its statement of the case presents a misleading version of the facts of this case. As a review of the factual summaries in the opinions of the Court of Appeals, the National Labor Relations Board (hereinafter referred to as "NLRB" or "the Board"), and the Administrative Law Judge[1] reflects, this case is not about a "violent" strike nor in any manner about picket line misconduct.[2]

Rather, as those factual summaries reveal, this case is about a course of conduct engaged in by petitioner in the summer of 1971 at its Allyn's Point, Connecticut plant: the critical events began when petitioner unilaterally imposed

[1] These opinions are all set forth in the Appendix to the Petition (hereinafter cited as "Pet. App.").

[2] In all of the opinions in this case, the only mention of petitioner's assertions regarding threats of reprisals and the like is in footnote 21 of the opinion of the Administrative Law Judge. Pet. App. 74a-75a. There, the opinion makes clear that "the record does not permit a ruling on the merits of the aforesaid factual assertions. . . ." Pet. App. 74a. Further, though it has no bearing on this case, we note the ultimate resolution of the state court action as to which petitioner makes mention (Pet. Br. at 6): petitioner's suit against the Union for damages and for a permanent injunction based on allegations of violence and other misconduct on the picket line ended in judgment for the Union; the Superior Court for New London County, Connecticut, denied the Company money damages as well as a permanent injunction, holding that "there was no legal evidence sufficient to justify an award of money damages." *The Dow Chemical Company* v. *Local No. 13744, International Union of District 50, Allied and Technical Workers*, No. 3 94 53, Superior Court for New London County (Nov. 27, 1973).

(and refused to bargain with the Union[3] over) a basic restructuring of part of its operation causing changes in shift schedules, rates of pay, and other conditions of employment; when the employees struck in protest of this unilateral action, Petitioner announced the cancellation of the entire collective bargaining agreement on the ground that the strike was a breach of the agreement's provision prohibiting strikes *except* where the grievance-arbitration procedures of the contract have been exhausted;[4] subsequent to the purported rescission, petitioner fired all employees remaining on

[3] At the time of the operative facts in this case, the employees at Petitioner's Allyn's Point plant were represented by International Union of District 50, Allied and Technical Workers, Local 13744 (now part of the United Steelworkers of America, AFL-CIO-CLC and referred to at all times herein as "the Union").

[4] The no-strike clause at issue in this case is unusual in a significant respect: the clause allowed for strikes after the exhaustion of the grievance-arbitration procedures. See, Pet. App. 4a-5a, n.4. Unlike most collective bargaining agreements, the parties here contemplated the possibility of strikes during the term of the contract. Before the Board, whether the Union had exhausted the grievance-arbitration procedures was a question in dispute which was resolved against the Union. Member Fanning, in his dissenting opinion, accurately characterized the technical nature of the Union's failure to exhaust (Pet. App. 44a, n.4):

> ". . . [A]fter [petitioner] announced its decision and refusal to negotiate concerning it, but indicated willingness to talk about the manner and timing of its implementation, the employees withheld strike action and attempted to utilize the grievance and arbitration procedures in an effort to get the decision changed. In practical effect they had exhausted those procedures when [petitioner's] officials flatly refused the Union's requests to agree to arbitrate the matter in a discussion initiated by [petitioner's] officials the day before they announced they were going to place the shift change into effect on June 7. The employees were apprised of all these developments, and struck rather than accept [petitioner's] unlawfully imposed change in rates of pay and conditions of employment. Even accepting my colleagues' premise that the strike violated the letter of the no-strike clause, the violation was technical in nature and does not warrant [petitioner's] rescission of the contract and withdrawal of recognition."

strike; finally, ten days after the firing of these employees was announced, petitioner withdrew recognition of the Union, claiming the Union no longer represented a majority of the newly-reduced workforce—thus purporting to end a collective bargaining relationship first established in 1954.

Upon consideration of charges filed by the Union, the General Counsel of the NLRB issued a complaint against petitioner, alleging that by the course of conduct just described petitioner had committed a number of unfair labor practices in violation of §§8(a)(1), (3), and (5) of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. §§151, *et seq.*) (hereinafter referred to as "the Act"). After a hearing, in which the Union participated as the charging party, the Administrative Law Judge issued an opinion in which he reached the following conclusions, *inter alia*: (1) that petitioner's unilateral action changing shift schedules, rates of pay, and other conditions of employment was an unfair labor practice in violation of §§8(a)(5) and (1) of the Act; (2) that the ensuing strike was in response to this unfair labor practice; (3) that, notwithstanding this Court's decision in *Mastro Plastics Corp.* v. *NLRB,* 350 U.S. 270 (1956), the general no-strike provision in the collective bargaining agreement constituted a waiver of the employees' statutory right to strike in protest against unfair labor practices of petitioner which are not "serious" in nature; (4) that petitioner's refusal to bargain was not a "serious" unfair labor practice; (5) that, therefore, the unfair labor practice strike was in breach of contract, and (6) that petitioner's unilateral cancellation of the collective bargaining contract, firing of the striking employees, and withdrawal of recognition of the Union, were permissible responses to this breach. Given these conclusions, the Administrative Law Judge determined that petitioner's conduct should go without remedy, and that the General Counsel's complaint should be dismissed.

A three-member panel of the Board, by a vote of 2-1, the

two-member majority not issuing a written opinion, affirmed the decision of the Administrative Law Judge and adopted his recommended order dismissing the complaint.

The Union filed a petition for review in the United States Court of Appeals for the Third Circuit. Petitioner here intervened in that action. The Court of Appeals remanded the case to the Board for reconsideration of two issues.

First, the court disagreed with the Board's approach of determining whether an unfair labor practice strike is in breach of a general no-strike provision by categorizing the unfair labor practice which caused the strike as "serious" or "non-serious." In the court's view, where there is no explicit waiver in the collective bargaining contract of the employees' right to engage in unfair labor practice strikes, the propriety of an employer's responding to an unfair labor practice strike with the kinds of self-help measures taken here—cancellation of the contract, termination of employees, and withdrawal of recognition of the Union—must be evaluated in light of the other means available to the employer for resolving the dispute which are less destructive of the national policy favoring stability in collective bargaining relationships, *e.g.*, here "the grievance procedure and the arbitral forum." Pet. App. 28a. Accordingly, the court directed the Board to re-examine its decision in light of such considerations.

Second, the court disagreed with the holding of the Administrative Law Judge, and thus the Board, that a strike in breach of a contract automatically gives the employer the right unilaterally to cancel the entire collective bargaining agreement. The court noted that considerations unique to the national labor policy weigh against strict application to collective bargaining agreements of the "material breach" doctrine applied in commercial contract cases. These considerations include the function of the collective bargaining agreement as "a system of industrial self-government" favored by the law and the compulsory nature of the bargain-

ing relationship between union and employer.[5] At a minimum then, the court concluded, determination of the validity of an employer's unilateral abrogation of a collective bargaining agreement must include consideration, *inter alia,* of the adequacy of legal and contractual remedies, whether the employer in good faith sought resort to such remedies, the "degree of fault on the part of the union," and "the likelihood that the contract will be honored for the remainder of the term." Pet. App. 32a-33a. The Board was asked to take such factors into account in reconsidering its decision.

Petitioner here unsuccessfully sought rehearing or rehearing en banc in the Court of Appeals, one judge dissenting from the denial of the latter. The Company's petition in this Court followed. The Board did not file a petition in this Court.

ARGUMENT

This case involves a unique set of facts and doctrines of law which are rarely invoked and as to which there is no true conflict among the circuits. It does not merit this Court's consideration.

We discuss briefly the state of the law as to the two questions that the Court of Appeals remanded to the Board for reconsideration:

1. In reading the petition it is easy to forget that the strike which occurred in this case was an unfair labor practice strike, *i.e.,* its object was not economic gain but to protest an unfair labor practice of the employer. In *Mastro*

[5] The court's analysis in this part of its opinion is illuminated by its citations to *United Steelworkers of America* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578-581 (1960); *Children's Rehabilitation Center, Inc.* v. *Service Employees,* 503 F.2d 1077, 1080 (3rd Cir.) (Chief Judge Seitz, dissenting), *cert. denied,* 419 U.S. 1090 (1974); and Cox, *The Legal Nature of Collective Bargaining Agreements,* 57 Mich. L. Rev. 1, 18-19 (1958). Pet. App. 31a-33a.

Plastics Corp. v. *NLRB, supra,* this Court held that the statutory right of employees to engage in strikes against the unfair labor practices of their employers is not waived by a general provision—which, as here, does not explicitly refer to unfair labor practice strikes—in a collective bargaining agreement limiting the right of a union to strike. In a 1961 decision, *Arlan's Department Store of Michigan, Inc.,* 133 NLRB 802, the Board interpreted *Mastro Plastics* to permit implication from a general no-strike clause of a waiver of the right to strike against "non-serious" employer unfair labor practices. The issue has arisen so infrequently that no federal court of appeals until the court below in this case has ever had occasion to pass on the validity of the *Arlan's* limitation to the rule of *Mastro Plastics.*[6]

Moreover, the approach taken by the court below was very much a function of the unique facts of this case. Petitioner had taken advantage of a strike in protest of its own unfair labor practice to fire striking employees, cancel the collective bargaining agreement, and withdraw recognition of the Union. A bargaining relationship of nearly twenty years was thus destroyed. In this extreme set of circumstances, the court concluded that if exceptions be permitted to the rule of *Mastro Plastics,* they must not be such as to permit an employer—through leverage from its own initial wrong—to achieve ends destructive of the system of collective bargaining, while eschewing peaceful means of resolving the underlying dispute. There is no reason for this Court to review that conclusion.

[6] Petitioner is able to support its claim that there is a conflict on this issue by reference only to one district court decision, *Dow Chemical Co.* v. *International Union of Electrical Workers,* 82 LRRM 3169, 3181 (M.D. Fla. 1971), aff'd. 480 F.2d 433 (5th Cir. 1973), *cert. denied,* 415 U.S. 432, and to *dicta* in two court of appeals decisions, *Pence Construction Corp.* v. *Int'l. Union of Operating Engineers, Local 450,* 484 F.2d 398, 401 (5th Cir. 1973), *cert. denied,* 414 U.S. 1144; *United Auto Workers (Kohler Co.)* v. *NLRB,* 300 F.2d 699, 704, n. 19 (D.C. Cir. 1962), *cert. denied,* 370 U.S. 911.

2. Assuming, *arguendo,* the union's strike in protest of petitioner's unfair labor practice was in breach of the collective bargaining agreement, the second issue which the court directed the Board to reconsider is reached. The opinion of the Administrative Law Judge, adopted by the two-member Board majority, relied on a 1953 decision of the Board, enforced by a 1955 decision of the District of Columbia Circuit, as basis for the proposition that a union's strike in breach of contract justifies, under the doctrine of material breach imported from general contract law, the employer's unilateral cancellation of the entire collective bargaining agreement. See, *Marathon Elec. Mfg. Co.,* 106 NLRB 1171 (1953), *enforced sub nom., United Elec., Radio & Machine Workers* v. *NLRB,* 223 F.2d 338 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 981 (1956). However, appropriate such a rule may have seemed in 1955, the ensuing 20 years have seen developments in the law that render the *United Electrical* decision wholly obsolete.

Two years after *United Electrical,* this Court first declared that the substantive law governing collective bargaining agreements is to be fashioned by the federal courts "from the policy of our national labor laws," *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 456 (1957). The Court explained that the general law governing contracts was *not* applicable, and that while courts might look to it for analogies, the incorporation of such analogous principles would be proper only insofar as "compatible with the purpose of" national labor policy, id. at 457.

Subsequent decisions of this Court have demonstrated the incompatibility of the doctrine of *United Electrical* with "the policy of our national labor laws."

In *United Steelworkers* v. *Warrior & Gulf Navigation Co.,* 363 U.S. 574, 578-579, 580 (1960), this Court described the unique nature of a collective bargaining agreement:

> "A collective bargaining agreement is an effort to erect a system of industrial self-government. When most parties enter into contractual relationship they do so voluntarily, in the sense that there is no real compulsion to deal with one another, as opposed to dealing with other parties. This is not true of the labor agreement. The choice is generally not between entering or refusing to enter into a relationship, for that in all probability pre-exists the negotiations. Rather it is between having that relationship governed by an agreed-upon rule of law or leaving each and every matter subject to a temporary resolution dependent solely upon the relative strength, at any given moment, of the contending forces. The mature labor agreement may attempt to regulate all aspects of the complicated relationship, from the most crucial to the most minute over an extended period of time.
>
> * * * *
>
> ". . . It is more than a contract; it is a generalized code . . . The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant."

Again, in *John Wiley & Sons* v. *Livingston,* 376 U.S. 543, 550 (1964), the Court emphasized the special nature of the relationship between the parties to a collective bargaining agreement:

> "Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstance . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship."

In *Drake Bakeries Incorporated* v. *American Bakery & Confectionary Workers,* 370 U.S. 254 (1962), and *Local Union No. 721, United Packinghouse Workers* v. *Needham Packing Co.,* 376 U.S. 247 (1964), the Court made clear

that the federal substantive law applicable to collective bargaining agreements does not favor the unilateral abrogation of contractual obligations; remedies on the agreement, not in derogation of it, serve the national labor policy:

> "The preferred method for settling disputes was declared by Congress to be '[f]inal adjustment by a method agreed upon by the parties' (§203(d) of the Act, 29 U.S.C. §173(d)). 'That policy can be effectuated only if the means chosen by the parties for settlement of their differences under a collective bargaining agreement is given full play' (*United Steelworkers* v. *American Mfg. Co.*, 373 U.S. 564, 566). Under our federal labor policy, therefore, we have every reason to preserve the stabilizing influence of the collective bargaining contract in a situation such as this."

Drake Bakeries, supra, 370 U.S. at 263-264.[7]

In the light of these developments, the holding in *United Electrical* cannot be considered to have present force.[8] Petitioner's reliance on that decision, as well as another pre-

[7] Numerous federal court of appeals decisions have followed *Needham* and *Drake Bakeries*. See, *e.g., United Steelworkers of America* v. *American International Aluminum Corp.*, 334 F.2d 147, 149, 150-151 (5th Cir. 1964); *Brotherhood of Locomotive Firemen & Enginemen, Lodge 844* v. *Kennecott Copper Corp.*, 338 F.2d 224, 226 (10th Cir. 1964); *Minnesota Joint Board, Amalgamated Clothing Workers of America* v. *United Garment Manufacturing Co.*, 338 F.2d 195, 199-299 (8th Cir. 1964); *Trailways of New England, Inc.* v. *Amalgamated Association of Street, Electric Railway and Motor Coach Employees*, 343 F.2d 815, 817 (1st Cir. 1965), *cert. denied*, 382 U.S. 879.

[8] The *United Electrical* decision has been uniformly criticized by the commentators. See, *e.g.*, SUMMERS, *"Collective Bargaining Agreements and the Law of Contracts,"* 78 Yale L.J. 525, 542-544 (1969); Cox, *"The Legal Nature of Collective Bargaining Agreements,"* 57 Mich. L. Rev. 1, 18 (1958); FELLER, *"A General Theory of the Collective Bargaining Agreement,"* 61 Calif. L. Rev. 663, 798 (1973).

Lincoln Mills decision,[9] as showing a conflict with the decision below is thus misplaced. Pet. Br. at 14. Similarly, petitioner does not establish a conflict among the circuits by the citation of a previous Third Circuit decision[10] which the court below treated by distinguishing its facts and, "[i]n the more general circumstances presented here," adopting the views of the dissenting judge. Pet. App. 31a; Pet. Br. 14.

In sum, the circuits are not in conflict, and the decision of the court below is a proper application of the principles governing collective bargaining agreements which this Court has enunciated.

[9] *Boeing Airplane Co.* v. *Aeronautical Industries Lodge No. 751, Int'l. Ass'n. of Machinists*, 188 F.2d 356 (9th Cir. 1951), *cert. denied*, 342 U.S. 821, *aff'g.* 91 F. Supp. 596 (W.D. Wash. 1950).

[10] *Children's Rehabilitation Center, Inc.* v. *Service Employees Int'l. Union, Local 227*, 503 F.2d 1077 (3rd Cir. 1974), *cert. denied*, 419 U.S. 1090.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari in this case should be denied.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 530 F. 2d 266. The decision of the National Labor Relations Board (Pet. App. 39a-47a), adopting the decision of the administrative law judge (Pet. App. 48a-79a), is reported at 212 NLRB 333.

JURISDICTION

The judgment of the court of appeals (Pet. App. 37a-38a) was entered on February 11, 1976. A petition for rehearing was denied, and a suggestion of rehearing *en banc* was rejected, on April 2, 1976 (Pet. App. 35a-36a). The petition for a writ of certiorari was filed on June 30, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employer may resort to self-help, in addition to or instead of contractual grievance resolution machinery, when a union strikes in violation of a no-strike clause in a collective bargaining agreement.

STATEMENT

1. The facts are fully set forth in the Board's decision (Pet. App. 50a-70a). In May 1971 petitioner (the "Company") unilaterally promulgated a change in the working schedule of its latex department.[1] Respondent Union filed a grievance over the Company's unilateral schedule change, and the parties completed the first four steps of the grievance procedure specified in their collective bargaining agreement. As a result of the meetings conducted during the grievance procedure, the Company postponed the effective date of the schedule change until June 7 (Pet. App. 51a-56a).

The collective bargaining agreement between the Company and the Union contained a no-strike and no-lockout provision. This provision barred the Union from engaging in a work stoppage unless and until all five steps of the grievance procedure had been exhausted, the Union had made a written request for arbitration after receipt of the Company's response in the fifth step, and arbitration had been either completed or refused. The Union did not invoke Step 5 of the grievance procedure or file a written request for arbitration. Instead, the Union struck on June 7, when the new schedule was to be implemented (Pet. App. 56a-57a).

[1]The Company announced that the department would change from a schedule of seven days on the job and two days off to a regular five-day work week (Pet. App. 51a-53a).

During the strike the Company wrote its employees a series of letters. The letters requested the employees to return to work and stated that the contractual grievance machinery should be used to resolve the dispute (Pet. App. 58a-59a).

The employees did not heed the call to return to work, and the Union did not urge them to do so. On July 23 the Company wrote the employees a letter informing them that it would begin hiring permanent replacements on July 29. By letter of August 9, the Company rescinded the collective bargaining agreement. On August 17 the Company discharged all of the striking employees. During the next 10 days a majority of the workers then employed by the Company in the bargaining unit signed a petition stating that they did not desire to be represented by the Union. Relying on this petition, the Company withdrew recognition from the Union (Pet. App. 56a-63a).

2. The Board concluded that the Company violated Section 8(a)(5) and (1) of the National Labor Relations Act, 61 Stat. 136, as amended, 29 U.S.C. 158(a)(5) and (1), by unilaterally changing the work schedule of the latex employees.[2] The Board further found that the strike violated the no-strike clause of the collective bargaining agreement because the "contract grievance procedure was available for the peaceful resolution of the dispute" but the Union "failed to submit the dispute in accordance with" that procedure (Pet. App. 71a).

The Board applied the rule of *Mastro Plastics Corp.* v. *National Labor Relations Board*, 350 U.S. 270, as interpreted in *Arlan's Department Store of Michigan, Inc.*, 133 NLRB 802, 807, that "only strikes in protest against

[2]Member Fanning agreed with this finding but dissented from the remainder of the Board's decision (Pet. App. 41a-47a).

serious unfair labor practices should be held immune from general no-strike clauses." It held that the Company's unilateral conduct, although an unfair labor practice, "was not of such serious nature as to be 'destructive of the foundation on which collective bargaining must rest' " (Pet. App. 70a-71a, quoting from *Mastro Plastics, supra*, 350 U.S. at 281). The Union's breach of the no-strike provision therefore was not excused by the Company's unfair labor practice, and the strike was "unprotected from its inception" (Pet. App. 71a). Finding that the Union's breach of the no-strike clause was material, the Board, relying on *Marathon Electric Mfg. Corp.*, 106 NLRB 1171, enforced, 223 F. 2d 338 (C.A. D.C.), certiorari denied, 350 U.S. 981, concluded that the Company did not violate Section 8(a)(5) and (1) of the Act by rescinding the collective bargaining agreement (Pet. App. 71a-74a).

Finally, because a strike in violation of a no-strike clause is not protected collective activity, the Board found that the Company did not violate Section 8(a)(3) and (1) of the Act by discharging the strikers (Pet. App. 75a-76a). And it held that once the Company had validly terminated the strikers, it was entitled to withdraw recognition from the Union based upon the petition signed by a majority of the employees (*id.* at 76a). The Board therefore decided that no remedial order should be entered (*id.* at 77a-79a).

3. The court of appeals sustained the Board's findings that the Company committed an unfair labor practice by unilaterally announcing a work change, and that the strike was improper because the Union failed to exhaust the grievance procedure and did not file a written request for arbitration (Pet. App. 12a). The court remanded the case to the Board, however, to consider the effect of *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235, and other recent developments, on the propriety of the Company's post-strike actions (Pet. App. 3a, 27a-28a).

The court declined "to resolve this case by simply pigeonholing it as within the rule of *Mastro Plastics* or that of *Arlan's*" (Pet. App. 13a), writing that it perceived fundamental developments in national labor policy since those cases were decided that "militate against reliance solely on *Mastro Plastics* or *Arlan's* in determining whether the company's post-strike actions were permissible" (*ibid.*). The court added (Pet. App. 24a):

> Given *quid pro quo* arbitration and no-strike provisions in a collective bargaining agreement, we would have no difficulty in concluding that an employer's failure to seek a *Boys Markets* injunction against a strike violating a no-strike clause would be an appropriate factor to consider in determining whether subsequent actions were permissible under the National Labor Relations Act. Thus, the availability of a *Boys Markets* injunction effects a *pro tanto* modification of the *Arlan's* rule.

The court acknowledged that a *Boys Markets* injunction would have been unavailable to the Company in the instant case, because the arbitration provision of the contract was elective (Pet. App. 24a).The court concluded, however, that "compliance with the grievance procedure was mandatory" (*ibid.*) even though arbitration was not compulsory. In the court's view, the Company had not fully discharged its obligations under this procedure (Pet. App. 25a-26a) and "the Board should have considered as a factor the company's failure to seek peaceful resolution through the grievance procedure and in the arbitral forum" (*id.* at 27a-28a).

ARGUMENT

The question whether an employer must "turn the other cheek" to an illegal strike, attempting to force the Union to comply with a grievance process the Union

initially abjured, rather than to utilize its traditional economic weapons, may require resolution by this Court in an appropriate case. We submit, however, that this is not such a case.

The court of appeals did not hold that the Company's acts in this case were necessarily unlawful. It simply remanded the case to the Board for further consideration in light of *Boys Markets* and other recent developments, stating that the Board had given insufficient consideration to the Company's decision not to press on to arbitration. Although the Board is prepared to defend its original decision should the Court grant the petition in this case,[3] the Board accepted the remand rather than seek review by this Court. The Board will reconsider its position, as the court of appeals has directed.[4] Review of this case would be appropriate, if at all, only after that process has been completed.

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[3]The union's no-strike pledge ordinarily is a *quid pro quo* for the employer's pledge to arbitrate grievances. *Gateway Coal Co.* v. *United Mine Workers*, 414 U.S. 368, 382; *Buffalo Forge Co.* v. *United Steelworkers of America*, No. 75-339, decided July 6, 1976, slip op. 9.

[4]In *Buffalo Forge*, *supra*, this Court disapproved (slip op. 6 n. 9, 10 n. 10) certain decisions of the Third Circuit cited in the decision below (Pet. App. 20a-25a) and held that a *Boys Markets* injunction was not available where "the strike was not *over* any dispute between the Union and the employer that was even remotely subject to the arbitration provisions of the contract" (slip op. 9-10). On remand, the Board will have an opportunity to reconsider its decision in light of both *Boys Markets* and *Buffalo Forge*, and to determine whether the latter decision affects its analysis.

Respectfully submitted.

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